92-591

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN M. POINDEXTER, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1505 is unconstitutionally vague.

2. Whether circumstantial evidence may be used to establish that a witness who has been exposed to immunized testimony was not affected by that exposure.

3. Whether the evidence of witnesses who have a present, independent recollection of events must be excluded from consideration by the jury when exposure to immunized testimony might have had an influence on the witnesses' thinking "for which they cannot at this time consciously account."

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PETITION FOR A WRIT OF CERTIORARI

The Independent Counsel, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-25a) is reported at 951 F.2d 369. The principal opinion of the district court (App., *infra*, 56a-125a) is unreported. An earlier opinion of the district court (App., *infra*, 138a-167a) is reported at 727 F. Supp. 1488.

JURISDICTION

The judgment of the court of appeals was entered on November 15, 1991, and a timely petition for rehearing was denied on July 8, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant portions of the Fifth Amendment to the United States Constitution and 18 U.S.C. 1505 and 6002 are set out in an appendix to this petition.

STATEMENT

After a three week trial, respondent John M. Poindexter was convicted on two counts of obstructing a congressional inquiry in violation of 18 U.S.C. 1505 (Counts 2 and 3), two counts of making false statements in violation of 18 U.S.C. 1001 (Counts 4 and 5), and one count of conspiring to commit the offenses specified in the other counts and to destroy official documents of the United States, in violation of 18 U.S.C. 371. He was sentenced to six months' imprisonment on each count, the sentences to run concurrently. The convictions were set aside on appeal.

1. According to the evidence at trial, the offenses of which Poindexter was convicted grew out of a series of transactions generally known as the "Iran/Contra affair." Poindexter, who served as Assistant to the President for National Security Affairs (or "National Security Advisor"), acted in concert with several others—prominent among them Oliver North, a member of the National Security Council staff—in a lengthy campaign to deceive Congress about a range of government activities associated with that affair. See generally App., *infra*, 57a-60a n.2.

In October 1984, Congress barred United States intelligence agencies from providing military support to forces (popularly known as "Contras") seeking to overthrow the government of Nicaragua. Shortly afterwards, North, with Poindexter's knowledge and support, initiated an extensive operation to provide just such assistance to the Contras. See App., *infra*, 57a-58a n.2; JA 1261-1263, 1294-1295, 2307-2310, 2315, 2533, 2572, 2589.[1] When

[1] "JA" refers to the joint appendix in the court of appeals.

questioned about these activities by three committees of the House of Representatives, Poindexter responded with letters that made false and misleading representations denying that the United States provided the Contras with military support. App., *infra*, 68a-69a. Poindexter also arranged for North to meet with representatives of the House Intelligence Committee. At the meeting, North falsely denied assisting the Contras; afterwards, Poindexter congratulated North on a job "Well Done." *Id.* at 69a; JA 2411.

In November 1985, while the Contra operation was underway, Poindexter became involved in the "Iran" element of the affair. At that time Poindexter was drawn into a plan to ship missiles to Iran in the hope of obtaining Iranian assistance for the release of American hostages being held in Lebanon. App., *infra*, 58a n.2; JA 2350-2352. In late November or early December 1985 President Reagan signed a Covert Action Finding (a so-called "Presidential Finding") retroactively authorizing the shipment and expressly indicating that it was meant to facilitate the release of the hostages. App., *infra*, 58a n.2.[2] Some of the proceeds from the Iranian arms sales ultimately were used to benefit the Contras.

Poindexter's deceptions began to unravel in early November 1986, when press reports appeared stating that the United States had exchanged arms for hostages with Iran. The House and Senate Intelligence Committees demanded meetings with Poindexter to obtain an explanation of the affair. JA 2439-2445. Prior to the meetings, Poindexter, North, and others created a false chronology stating that American officials had not known before January 1986 that the November 1985 shipment to Iran contained missiles (App., *infra*, 70a-71a; JA 2454); an

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[2] To deemphasize the finding's language about the exchange of arms for hostages, Poindexter and North subsequently obtained a second finding to cover future shipments of missiles to Iran. This finding, signed by President Reagan in January 1986, portrayed the arms sales principally as an effort to support moderate elements in the Iranian government. JA 2368.

acknowledgement of American involvement in that shipment might have triggered a search for the initial Presidential Finding, which would have revealed the character of the transaction as an exchange of arms for hostages. JA 1864-1865.

In late November 1986, Poindexter held separate meetings with the House and Senate Intelligence Committees. At these meetings, Poindexter gave a false account of the dealings with Iran that closely paralleled the one outlined in the deceptive chronology. App., *infra*, 59a n.2, 73a-75a; JA 2473-2481, 2488. Afterwards, upon learning that the Attorney General had begun an investigation of the affair, Poindexter deleted from his office computer some 5000 files, many of which evidenced his own involvement in the Iran/Contra affair. App., *infra*, 59a n.2, 71a-72a; JA 1704-1709. With North in attendance, Poindexter also destroyed the November 1985 Presidential Finding, which contained what was regarded as embarrassing language about the exchange of arms for hostages. App., *infra*, 59a n.2; JA 1594-1595, 1598-1600.

On December 19, 1986, an Independent Counsel was appointed in this case pursuant to 28 U.S.C. 593(b). A grand jury was empaneled on January 28, 1987. Congress, meanwhile, commenced its own investigation of the Iran/Contra affair. Poindexter received use immunity in connection with this investigation pursuant to 18 U.S.C. 6002. He began public immunized testimony on July 15, 1987.

Poindexter was indicted on March 16, 1988. Two counts charged violations of 18 U.S.C. 1505, which in relevant part subjects to punishment anyone who

> corruptly * * * influences, obstructs, or impedes or endeavors to influence, obstruct or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress * * * .

One of the Section 1505 counts charged that Poindexter obstructed Congress by sending the letters that made false and misleading representations regarding North's assistance to the Contras, and by arranging the meeting at which North gave false answers to the House Intelligence Committee; the other charged that Poindexter obstructed congressional inquiries by participating in the creation of the false chronology, by deceiving the House and Senate Intelligence Committees in November 1986 about the arms shipments to Iran, and by deleting the files from his office computer. Two additional counts charged that Poindexter violated 18 U.S.C. 1001 by making the false statements to the House and Senate Intelligence Committees in November 1986. A fifth count charged Poindexter with violating 18 U.S.C. 371 by conspiring both to commit the offenses charged in the other counts and to destroy official documents of the United States.

2. Prior to trial, the district court sought to implement the mandate of this Court's decision in *Kastigar* v. *United States*, 406 U.S. 441 (1972), by taking extensive steps to ensure that Poindexter's immunized statements were not used against him. After reviewing statements that had been made by potential trial witnesses before Poindexter's immunized testimony became publicly available (JA 349, 2231), the court found that all of the proposed testimony of most of these witnesses "had been memorialized prior to July 15, 1987" (App., *infra*, 157a) and therefore could not have been affected by Poindexter's immunized disclosures. *Id.* at 77a-78a. As for those witnesses whose trial testimony would not be limited to that memorialized—or, in the vernacular, "canned"—prior to Poindexter's congressional appearance, the district judge found that the proposed trial testimony of most of them concerned subjects that Poindexter did not address in his immunized statements or involved "only insubstantial elaborations of information the witness had furnished prior thereto." *Id.* at 158a. At the same time, the court found that the prosecutors had not been exposed in any significant respect to the immunized testimony. *Id.* at 151a-155a.

This left the government still to prove that five of its potential witnesses were free of taint. The district judge ordered these witnesses to appear at a pretrial *Kastigar* hearing. App., *infra*, 78a, 159a. Of the three of these witnesses who subsequently testified at trial, two credibly affirmed that their anticipated trial testimony would not "in any way [be] affected by Admiral Poindexter's immunized testimony." JA 654-655. See App., *infra*, 159a-163a; JA 635, 637, 640, 654-655, 666, 669, 671, 675, 689.

The third witness, Oliver North, took a different tack. He stated at the *Kastigar* hearing that "he was unable, with respect to *any* subject, to distinguish between what he had personally done, observed, or experienced and what he had heard about the events by way of Poindexter's immunized testimony." App., *infra*, 83a (emphasis added). As for Poindexter's destruction of the November 1985 Presidential Finding—an important piece of information, since it suggested Poindexter's possession of a motive to deceive Congress—North acknowledged that he had seen Poindexter destroy a piece of paper, but insisted that he did not know that the document was the finding until Poindexter stated that fact before Congress. JA 904, 967, 969, 1015-1016.

Although deeply "skeptical" regarding North's claims, the trial court initially ruled that North would be permitted to give only limited testimony. App., *infra*, 164a. Subsequently, however, the district court rejected North's testimony at the *Kastigar* hearing as incredible. *Id.* at 133a-137a. Basing its ruling on North's demeanor, on inconsistencies in North's testimony, and on other objective indicia that North had an untainted memory of events, the court found that North "appears to have been embarked at that time upon the calculated course of attempting to assist his former colleague and co-defendant * * * by prevaricating on various issues, including most notably the issue whether he had to rely for his recollection of events on Poindexter's immunized testi-

mony." *Id.* at 133a (footnote omitted).[3] North accordingly was permitted to testify. Poindexter was convicted on all counts.

3. a. A divided court of appeals reversed the convictions. App., *infra*, 1a-55a. The majority initially concluded that all of the convictions had to be set aside because, in its view, the trial court's measures failed to ensure that Poindexter's immunized testimony was not used against him at trial. In reaching this conclusion, the court of appeals restated the standard set out in *United States* v. *North*, 910 F.2d 843 ("*North I*"), modified, 920 F.2d 940 (D.C. Cir. 1990) ("*North II*"), cert. denied, 111 S. Ct. 2235 (1991): "that a prohibited 'use' [of immunized testimony] occurs if a witness's recollection is refreshed by exposure to the defendant's immunized testimony, *North I*, 910 F.2d at 860-61, or if his testimony is in any way 'shaped, altered, or affected,' by such exposure, *id.* at 863." App., *infra*, 7a-8a. Under this standard, the court explained, " 'the government must demonstrate affirmatively that the immunized testimony did not * * * [have] an influence on [the trial witnesses'] thinking, even one for which they cannot at

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[3] The court explained the basis for this conclusion in considerable detail. A "critical factor leading to the Court's credibility determination was North's demeanor at the * * * *Kastigar* hearing," which the trial judge found "evasive, disingenuous, and argumentative"—in all, the demeanor "of a witness who is not telling the truth." App., *infra*, 85a. The judge also found that North's testimony at his own trial (which predated the Poindexter *Kastigar* hearing) contained substantial detail that was different from, or contradicted, Poindexter's immunized disclosures, thereby suggesting North's possession of a substantial independent recollection of events. *Id.* at 86a-89a & n.48. So far as the Presidential Finding was concerned, the court determined that North's testimony at his own trial was inconsistent with his assertion at the *Kastigar* hearing that he had not been aware of the nature of the destroyed document. And the court found it "inherently incredible" that North did not remember "his participation in an event he witnessed first hand that was as dramatic, indeed historic, as the tearing up of an extremely rare Presidential Finding." *Id.* at 84a.

this time consciously account.'" *Id.* at 10a (citation omitted).

Although this case was tried prior to the decision in *North*, the court of appeals declined to remand for new findings under the *North* standard. App., *infra*, 11a.[4] Focusing on North's testimony (see *id.* at 12a-17a), the court held that the district judge's finding that North lied when he denied having an independent recollection could not be used to support the proposition that North *did* have an untainted memory. *Id.* at 15a. The court of appeals also went on to reason that the district judge's finding of differences between North's account and Poindexter's immunized testimony was irrelevant, opining that a "substantially exposed witness" who has not "canned" his testimony may give evidence at trial only when he "persuasively claim[s] that he can segregate the effects of his exposure." *Id.* at 16a.

b. Having set aside all the convictions, the court of appeals went on to bar reprosecution on the two counts charging violations of Section 1505, which proscribes "corruptly" endeavoring to impede a congressional inquiry. The court held the statute unconstitutionally vague as applied to Poindexter. Its analysis began with the proposition "that, on its face, the word 'corruptly' is vague." App., *infra*, 20a. The court went on to find that neither the legislative history nor prior judicial constructions of Section 1505 put Poindexter on notice that lying to Congress in order to confound its inquiries falls within the statutory proscription. *Id.* at 34a. The court left open the possibility that Section 1505 might

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[4] Poindexter had been indicted together with North; the court of appeals held in *North* that the indictment may have been tainted. See 910 F.2d at 853-873. The court restated that holding here. App., *infra*, 17a-18a. So far as the indictment is concerned, however, the court did remand the case so that the government could attempt to show "that the evidence received by the grand jury was untained, or that any taint was harmless beyond a reasonable doubt." *Ibid.*

constitutionally be applied to "transitive" conduct (*id.* at 23a) or to "subornation" (*id.* at 37a), where the defendant corrupts *someone else* by influencing that person "(through bribery or otherwise) to violate a legal duty." *Ibid.* But such an interpretation "would still not cover the conduct at issue on this appeal—making false and misleading statements to the Congress." *Id.* at 39a.

c. Chief Judge Mikva dissented in part. App., *infra*, 46a-55a. Although he did not take issue with the *North* standard, he complained that in *North* "the Court changed the standards the special prosecutor had to meet; today we refuse to let him try to meet them." *Id.* at 46a. The majority's failure to accord any weight to the district judge's credibility findings, Chief Judge Mikva added, "tells future defendants that all they need to evade responsibility [to testify at trial] is a well timed case of amnesia." *Id.* at 50a. The dissent also took issue with the court's holding on Section 1505, finding it "obvious * * * that Poindexter 'corruptly' obstructed the congressional investigation when he lied to Congress." *Id.* at 51a.

REASONS FOR GRANTING THE PETITION

The ruling below resolved two issues that hold great importance both for the administration of justice and for the conduct of the business of Congress and of federal agencies. The court of appeals' decision to declare 18 U.S.C. 1505 unconstitutional as applied to an important class of obstructive activities leaves a large gap in the criminal law, while endorsing a method of analyzing constitutional vagueness challenges that could prove enormously destructive to a substantial body of federal legislation. At the same time, the Fifth Amendment holding—which goes far beyond the earlier ruling in *North*—erects substantive and procedural obstacles of unprecedented strictness to the prosecution of persons who have given public immunized testimony. That rule will frustrate both congressional oversight and criminal prosecution of a substantial range of wrongful conduct. Review by this Court therefore is in order.

A. Section 1505 Is Not Unconstitutionally Vague

In holding Section 1505 unconstitutional as applied to all cases that do not involve subornation, the court of appeals suggested neither that Poindexter's conduct fell outside the plain terms of Section 1505 nor that Poindexter actually might have believed his conduct to be legal.[5] Instead, the court began with the proposition "that, on its face, the word 'corruptly' is vague." App., *infra*, 20a. See *id.* at 21a-22a. It then found that this supposed vagueness was not dispelled either by the statute's legislative history (see App. *infra* at 22a-34a) or by its prior judicial constructions. *Id.* at 34a-37a.

In our view, this decision—which held facially vague a term ("corruptly") that appears in some 18 federal criminal statutes, and declared unintelligible to ordinary persons a provision whose antecedents run back (in something very like its present form) more than 160 years[6]—may fairly be characterized as astonishing. It renders nugatory a law that is of central importance in combatting corrupt and obstructive behavior. It invites con-

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[5] In fact, the jury found that Poindexter was *aware* of the illegality of his conduct. The jury was charged that "[t]he word corruptly means having the * * * improper purpose of obstructing the inquiry, that is, having the specific intent unlawfully to impair, obstruct, or impede the inquiry, *with knowledge that the conduct was unlawful*." JA 2131, 2184 (emphasis added). See also JA 2126, 2175. While we doubt that knowledge of illegality actually is an element of the offense under Section 1505 (see *North I*, 910 F.2d at 884), the instruction and verdict here make clear the jury's conclusion that Poindexter was not in fact taken unawares by the application of the statute to his activity.

[6] As the court of appeals itself noted (App., *infra*, 25a), Section 1505's origins ultimately are traceable to a provision enacted in 1831, which is the direct predecessor of the obstruction of justice statute now codified at 18 U.S.C. 1503. The 1831 provision subjected to punishment persons who "corruptly, or by threats or force, endeavour to influence, intimidate, or impede any juror, witness, or officer, in any court of the United States, in the discharge of his duty, or shall, corruptly, or by threats or force, obstruct, or endeavour to obstruct or impede, the due administration of justice therein." Act of Mar. 2, 1831, c.98, § 2, 4 Stat. 487.

tinuing litigation regarding the constitutionality of the many other statutes drawn in similar terms. It adopts an insupportably expansive approach to the void-for-vagueness doctrine, which, this Court repeatedly has emphasized, "is not a principle designed to convert into a constitutional dilemma the practical difficulties of drawing criminal statutes * * *." *Colten* v. *Kentucky*, 407 U.S. 104, 110 (1972). And not surprisingly, it cannot be reconciled with decisions of this and other courts.

1. While the court below labeled Poindexter's vagueness argument "compelling" (App., *infra*, 22a), other courts have found identical contentions so insubstantial as barely to warrant discussion. Two courts of appeals nevertheless have had occasion expressly to reject vagueness attacks on Section 1505, explaining that the statutory "language is more than adequate to forewarn a reasonable person that any attempt to improperly influence a congressional investigation is illegal." *United States* v. *Mitchell*, 877 F.2d 294, 299 n.5 (4th Cir. 1989). See *United States* v. *Leo*, 941 F.2d 181, 199 (3d Cir. 1991) ("reject[ing] [the defendant's] contention that the statute did not give him fair notice that his conduct was prohibited").[7] Because neither of these cases presented what the court below termed the "subornation" or "transitive" paradigm (App., *infra*, 37a, 23a)—*Leo* involved a false statement by the defendant himself (see 941 F.2d at 187, 198) and *Mitchell* a direct attempt by the defendants to pretermit a congressional investigation (see 877 F.2d at 297, 299-300)—both are flatly inconsistent with the holding below.

Similarly, three other courts of appeals have held that the virtually identical language of the so-called "omnibus clause" of 18 U.S.C. 1503,[8] Section 1505's companion ob-

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[7] In fact, the defendant in *Leo* evidently had no doubt about the meaning of the term "corruptly"; instead, he directed his vagueness challenge to Section 1505's use of the phrase "pending proceeding." See 941 F.2d at 198-199.

[8] The initial clauses of Section 1503 reach persons who either injure or "corruptly, or by threats or force, or by any threatening

struction of justice provision, provides "fair and conspicuous notice of what behavior it interdicts." *United States* v. *Cintolo*, 818 F.2d 980, 997 (1st Cir.), cert. denied, 484 U.S. 913 (1987). See *United States* v. *Jeter*, 775 F.2d 670, 677-679 (6th Cir. 1985), cert. denied, 475 U.S. 1142 (1986); *United States* v. *Griffin*, 589 F.2d 200, 206-207 (5th Cir. 1978) (Wisdom, J.), cert. denied, 444 U.S. 825 (1979); *Anderson* v. *United States*, 215 F.2d 84, 90 (6th Cir.), cert. denied, 348 U.S. 888 (1954). Those decisions also cannot also be reconciled with the holding below.[9]

In addition, the D.C. Circuit's holding would have required different outcomes in numerous cases in which other courts (including at least six courts of appeals) affirmed the convictions under Section 1505 of defendants who made false statements, concealed evidence, or otherwise obstructed inquiries by means that were not "transitive" and did not amount to subornation. Some of these decisions flatly held that the use of "false and evasive" statements is proscribed by the "plain meaning" of the statutory language. *United States* v. *Alo*, 439 F.2d 751, 753 (2d Cir.), cert. denied, 404 U.S. 850 (1971). See *Leo*, 941 F.2d at 198 (Section 1505 "cover[s] false statements to a federal auditor"). In others, the defendants failed even to suggest that Section 1505 did not reach their conduct and the courts found it unnecessary expressly to discuss the question, which shows how little doubt has existed

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letter or communication," endeavor to influence grand or petit jurors or court officers. The concluding omnibus clause subjects to punishment any person who "corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice."

[9] Indeed, so far as we are aware *every* court to consider the question in any setting has held that the term "corruptly" is not unconstitutionally vague. See *United States* v. *McElroy*, 910 F.2d 1016, 1022 (2d Cir. 1990) (rejecting vagueness challenge to 18 U.S.C. 215(a)); *United States* v. *Pommerening*, 500 F.2d 92, 97 (10th Cir.) (rejecting vagueness challenge to 18 U.S.C. 201(b)), cert. denied, 419 U.S. 1088 (1974).

about the scope of the statute.[10] The court below disregarded that uniform judgment of the legal community.

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[10] See *United States* v. *Schwartz*, 924 F.2d 410, 422-423 (2d Cir. 1991) (false statements); *United States* v. *Bejasa*, 904 F.2d 137, 139 (2d Cir.) (false statements), cert. denied, 111 S. Ct. 299 (1990); *United States* v. *Tallant*, 547 F.2d 1291, 1299 n.18 (5th Cir.) (presentation of false records), cert. denied, 434 U.S. 889 (1977); *United States* v. *Fruchtman*, 421 F.2d 1019, 1020-1022 (6th Cir.) (submitting false documents), cert. denied, 400 U.S. 849 (1970); *United States* v. *Laurins*, 857 F.2d 529, 536-537 (9th Cir. 1988) (concealing documents), cert. denied, 492 U.S. 906 (1989); *United States* v. *Vixie*, 532 F.2d 1277, 1278 (9th Cir. 1976) (submitting false documents); *United States* v. *Victor Teicher & Co.*, 726 F. Supp. 1424, 1437-1438 (S.D.N.Y. 1989) (false statements); *United States* v. *Berg*, 710 F. Supp. 438, 440, 445 (E.D.N.Y. 1989) (false statements); *United States* v. *Naserkhaki*, 713 F. Supp. 190, 192 (E.D. Va. 1989) (false statements; motion to dismiss indictment denied); *United States* v. *Lord*, 710 F. Supp. 615, 616, 618 (E.D. Va. 1989) (false statements), aff'd, 902 F.2d 1567 (4th Cir. 1990); *United States* v. *Presser*, 187 F. Supp. 64, 66 (N.D. Ohio 1960) (destroying and concealing documents).

The courts also generally have had no trouble applying Section 1503's omnibus clause to false statements or other conduct not amounting to subornation. See, *e.g.*, *United States* v. *Langella*, 776 F.2d 1078, 1081 (2d Cir. 1985) (perjury and concealment of evidence by lying), cert. denied, 475 U.S. 1019 (1986); *United States* v. *Cohn*, 452 F.2d 881, 883-884 (2d Cir. 1971) (false and evasive testimony), cert. denied, 405 U.S. 975 (1972); *United States* v. *Williams*, 874 F.2d 968, 976-982 (5th Cir. 1989) (false or evasive testimony); *Griffin*, 589 F.2d at 204-205 (Wisdom, J.) (perjurious and evasive testimony; "[w]hether [the defendant's] testimony is described in the indictment as 'evasive' because he deliberately concealed knowledge or 'false' because he blocked the flow of truthful information is immaterial"); *United States* v. *Howard*, 569 F.2d 1331, 1334-1336 (5th Cir.) (sale of grand jury minutes), cert. denied, 439 U.S. 834 (1978); *United States* v. *Jeter*, 775 F.2d at 676-677 (sale of grand jury minutes); *United States* v. *Gonzalez-Mares*, 752 F.2d 1485, 1491 (9th Cir.) (false statements), cert. denied, 473 U.S. 913 (1985); *United States* v. *Rasheed*, 663 F.2d 843, 851-852 (9th Cir. 1981) (concealing documents), cert. denied, 454 U.S. 1157 (1982); *United States* v. *Thomas*, 916 F.2d 647, 652 (11th Cir. 1990) (false statements); *United States* v. *Perkins*, 748 F.2d 1519, 1528 (11th Cir. 1984) ("false or evasive testimony"); *United States* v. *Gregory*, 611 F. Supp. 1033, 1039 (S.D.N.Y. 1985) (Weinfeld, J.) ("perjured testimony *is* obstruction of justice,"

2. As the frequency and scope of its application suggests, the invalidation of Section 1505 as applied to a broad range of obstructive conduct will have very significant practical consequences. The court of appeals nevertheless seemed untroubled by the prospect of debilitating the principal weapon against obstruction of Congress and of federal agencies, noting that false statements made to federal officials are subject to prosecution under 18 U.S.C. 1001. See App., *infra*, 20a. But Section 1001 does not fill the gap left by the holding below. Many common forms of obstructive behavior—such as concealing or destroying evidence, conduct actually undertaken by Poindexter in this case and charged in Count 3—fall outside the scope of that statute.[11]

In fact, Section 1505 and its companion obstruction provisions were enacted precisely because proscriptions against specific types of misconduct are inadequate to accomplish the congressional purpose: "The obstruction of justice statute was drafted with an eye to the variety of corrupt methods by which the proper administration of justice may be impeded or thwarted, a variety limited

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although Section 1503 count dismissed as multiplicitous); *United States* v. *Muniz*, 690 F. Supp. 482, 488 (E.D. Va. 1988) (false testimony); *United States* v. *Caron*, 551 F. Supp. 662, 667 n.6 (E.D. Va. 1982) (false statements), aff'd mem. 772 F.2d 739 (4th Cir. 1983), cert. denied, 465 U.S. 1103 (1984).

[11] In addition to the false statement offense, Section 1001 makes it a crime to "conceal[] or cover[] up by any trick, scheme, or device" a material fact within the jurisdiction of a federal department. But the courts have given this provision a restrictive interpretation, holding that "[g]enerally, concealment violations under § 1001 relate to the nondisclosure of statements required by statute, government regulation, or form." *United States* v. *Tobon-Builes*, 706 F.2d 1092, 1096 (11th Cir. 1983). See *United States* v. *Anzalone*, 766 F.2d 676, 683 (1st Cir. 1985); *United States* v. *Nersesian*, 824 F.2d 1294, 1312 (2d Cir.), cert. denied, 484 U.S. 958 (1987); *United States* v. *Larson*, 796 F.2d 244, 246 (8th Cir. 1986); *United States* v. *Irwin*, 654 F.2d 671, 679 (10th Cir. 1981), cert. denied, 455 U.S. 1016 (1982). It therefore is doubtful that the statute could be stretched to reach much of the conduct undertaken by Poindexter here.

only by the imagination of the criminally inclined." *Mitchell*, 877 F.2d at 299 (citations and internal quotation marks omitted). These statutes thus have been used to reach conduct as varied as, for example, arranging an unnecessary operation to cause a mistrial (see *United States* v. *Minkoff*, 137 F.2d 402 (2d Cir. 1943)) or planting illegal liquor in a crime victim's premises to discredit the victim as a witness. See *Knight* v. *United States*, 310 F.2d 305 (5th Cir. 1962). The decision below would leave no statutory proscriptions against such activities, or against Poindexter's less imaginative (if equally harmful) misconduct.[12]

3. In addition, the effect of the decision below may be expected to reach well beyond Section 1505. At least 17 other federal criminal statutes use the word "corruptly" to define an element of the offense. Five of these are obstruction statutes that apply the word in a manner that is almost identical to, or otherwise closely parallels, Section 1505.[13] The other statutes appear throughout the U.S. Code, ranging from provisions that address foreign corrupt practices to those that concern the destruction of vessels to one that prohibits perjury before consular officers.[14]

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[12] The court of appeals' holding, moreover, will do more than interdict future prosecutions; it will lead to post-conviction litigation on the part of persons who have been successfully prosecuted under Section 1505 and who, under the decision below, presumably are entitled to relief from judgment under 28 U.S.C. 2255. See *Davis* v. *United States*, 417 U.S. 333, 346-347 (1974).

[13] See 18 U.S.C. 1032(2) (concealment of assets from a conservator; reaches conduct that "corruptly impedes or endeavors to impede" the conservator); 18 U.S.C. 1503 (obstruction of justice); 18 U.S.C. 1512 (witness tampering; reaches conduct that "corruptly persuades" another to withhold testimony); 18 U.S.C. 1517 (obstructing the examination of a financial institution; reaches conduct that "corruptly obstructs or attempts to obstruct" the examination); 26 U.S.C. 7212 (interference with administration of the internal revenue laws; reaches anyone who "corruptly * * * impedes, or endeavors to obstruct or impede, the due administration of this title").

[14] 15 U.S.C. 78dd-1(a), 78dd-2(a) (foreign corrupt practices; reaches "use of the mails or other means or instrumentalities of

Given the court of appeals' judgment "that, on its face, the word 'corruptly' is vague" (App., *infra*, 20a), its holding calls into question the constitutionality of all of these statutes. And at a minimum, that decision creates considerable uncertainty—and invites continuing litigation—about whether the legislative history or prior judicial construction of each of these provisions is sufficiently specific to satisfy the court of appeals' standard.

4. With all of that said, it bears emphasis that the standard employed below plainly was the wrong one. The court of appeals used a sort of deconstructive analysis, wrenching the word "corruptly" from its context, declaring the word vague on its face, and then finding insufficient clarity imported by Section 1505's legislative history or prior judicial constructions. This roundabout analysis led the court to the remarkable conclusion that reasonable people would not understand the obstruction of Congress statute to reach those who lie to a congressional committee with the purpose of thwarting a congressional inquiry —and suggests, as Chief Judge Mikva put it below, "that Congress meant to prohibit attempts to obstruct justice by influencing someone else to violate a legal duty, but did not mean to prohibit attempts to obstruct justice by violating one's own legal duty." App., *infra*, 53a. As this

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commerce corruptly" in furtherance of specified acts); 18 U.S.C. 2272, 2273 (destruction of vessels; reaches "corruptly casting away or otherwise destroying" a vessel); 22 U.S.C. 4221 (perjury before a consular officer; reaches persons who "corruptly commit perjury"). See also 10 U.S.C. 931 (perjury by military personnel; reaches persons who "willfully and corruptly" perjure themselves); 18 U.S.C. 201(b), (c), (d) (bribery; reaches person who "corruptly gives" or "asks"); 18 U.S.C. 215(a)(1), (2) (influencing a financial institution; reaches person who "corruptly gives" or "solicits"); 18 U.S.C. 666(a)(1)(B), (a)(2) (theft or bribery relating to programs receiving federal funds; reaches person who "corruptly solicits" or "gives"); 18 U.S.C. 1158 (counterfeiting specified trademarks; reaches person who "corruptly affixes" the trademark); 18 U.S.C. 2271 (conspiracy to destroy vessels; reaches person who "corruptly conspires"); 28 U.S.C. 2514 (forfeiture of fraudulent claims; reaches person who "corruptly practices or attempts to practice any fraud").

Court has explained in similar circumstances, "[s]uch straining to inject doubt as to the meaning of words where no doubt would be felt by the normal reader is not required by the 'void-for-vagueness' doctrine, and we will not indulge in it." *United States* v. *Powell*, 423 U.S. 87, 93 (1975). In fact, the decision below cannot be reconciled with this Court's holdings on any level.

First, we think it plain that the word "corruptly" is not without discernible meaning to people of average intelligence—and that, in particular, "when measured by common understanding and practices" (*Jordan* v. *De George*, 341 U.S. 223, 231-232 (1951)), most people would conclude that those who lie to Congress or destroy documents needed for its investigative efforts have "corruptly * * * endeavor[ed] to influence, obstruct, or impede" an inquiry. With the exception of the majority below, that has been the uniform view of every judge to consider the issue. Indeed, this Court has rejected vagueness attacks against statutes reaching "crimes involving moral turpitude" (see *Jordan*, 341 U.S. at 225, 231) or "crime[s] against nature" (*see Rose* v. *Locke*, 423 U.S. 48, 50-51 (1975) (per curiam)), which surely have no greater clarity than does Section 1505.

Second, the court below simply disregarded the objective criteria that this Court has used in addressing vagueness challenges. In *Jordan*, for example, the Court found it "significant that the phrase [asserted to be vague] has been part of the * * * law[] for more than sixty years" (341 U.S. at 229), and that the phrase "has also been used for many years * * * in a variety of other statutes. No case has been decided holding that the phrase is vague, nor are we able to find any trace of judicial expression which hints that the phrase is so meaningless as to be a deprivation of due process." *Id.* at 230. See *Rose*, 423 U.S. at 50. Those observations are equally applicable here, of course; as we explain above, the relevant language has been part of the law for more than *160* years, appears throughout the U.S. Code, and never before has been held unconstitutional. In deciding whether the statute

"has a meaning sufficiently precise for a man of average intelligence to 'reasonably understand that his contemplated conduct is proscribed'" (*United States* v. *Mazurie*, 419 U.S. 544, 553 (1975) (citation omitted)), it surely is relevant that generations of legislators, judges—and defendants—have had no trouble understanding the reach of its terms.

Third, the Court has noted the significance of prior constructions of an assertedly vague statute, finding it relevant that "[a]nyone who cared to do so could certainly determine what particular acts have been considered" to be proscribed. *Rose*, 423 U.S. at 50. While the court of appeals purported to acknowledge this principle, its analysis missed the mark. The court noted two decisions (of the many that actually are on the books, see pages 12-13, *supra*) affirming Section 1505 convictions that predated Poindexter's conduct, one involving *evasive statements*, the other the submission of *false documents*. See App., *infra*, 34a, citing *United States* v. *Vixie*, *supra*, and *United States* v. *Alo*, *supra*. The court below evidently was of the view that, because Poindexter's actions were not identical to those in either case, the prior prosecutions did not put him on notice that *false statements* violate the statute; the court complained that the rulings "simply do not contain sufficiently clear—or consistent—reasoning to permit such an extrapolation." *Id.* at 34a.

On its face, this analysis is, to say the least, surprising; most people surely would "extrapolat[e]" from the decided cases that, if the presentation of evasive statements and of false documents is subject to prosecution, the submission of false statements and the destruction of documents might be as well. Equally as important, the reasoning used below flatly disregards this Court's express admonition that prior application of a statute to "factually identical conduct" is *not* "a prerequisite to a statute's withstanding constitutional attack. If that were the case it would be extremely difficult ever to mount an effective prosecution based upon the broader of two reasonable

constructions of newly enacted or previously unapplied statutes." *Rose*, 423 U.S. at 51.

Fourth, the court of appeals' ultimately inconclusive examination of Section 1505's legislative history, which it found "[o]n balance * * * seems to support the transitive interpretation of 'corruptly' " (App. *infra*, 33a), misstates the plain import of the statutory background. As initially enacted in 1940, Section 1505's predecessor had two clauses. The first applied to any person who "corruptly * * * shall endeavor to influence, intimidate, or impede any witness"; the second reached any person who "corruptly * * * shall * * * endeavor to influence, obstruct, or impede" an administrative proceeding or congressional inquiry. Act of January 13, 1940, ch. 1, § 135 (a), 54 Stat. 13. As the first clause directly addressed endeavors to suborn or tamper with witnesses, it is hardly likely that the second clause was intended to serve (indeed, be limited to) a similarly "transitive" purpose; Chief Judge Mikva correctly noted below that "the second clause, which contains the wording now in section 1505, would be superfluous if it was construed as the majority would construe it." App., *infra*, 54a.

This understanding is confirmed by the 1982 amendment of the statute, which deleted the first clause of Section 1505 and enacted a new provision, codified at 18 U.S.C. 1512, that prohibits killing, intimidating, "corruptly persuad[ing]," misleading, or harassing a witness so as to hinder his testimony in an official proceeding. Again, it seems plain that Congress would not have transferred the provision addressing witness tampering to another statutory section if it intended the remaining clause of Section 1505 to reach only subornation.[15]

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[15] There is direct evidence in the 1982 legislative history that Congress had no such intent. Addressing the initial version of the Senate bill that became Section 1512, which contained a catchall provision that closely paralleled Section 1505 and the omnibus clause of Section 1503, the Senate Report cited with approval several prosecutions (including *United States* v. *Alo*, *supra*) under those statutes that did not involve subornation. S. Rep. No. 532, 97th Cong., 2d

Finally, the possibility of imagining cases in which the applicability of Section 1505 might be unclear is beside the point here; the Court has held "many times that statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within the language." *United States* v. *National Dairy Corp.*, 372 U.S. 29, 32 (1963). The Court repeatedly has affirmed that the prospect of conjuring up such hypothetical circumstances cannot defeat an otherwise constitutional prosecution. See *Powell*, 423 U.S. at 93; *United States* v. *Harriss*, 347 U.S. 612, 618 (1954); *Jordan*, 341 U.S. at 231. To the contrary, it is enough "that reasonable persons would know that their conduct is at risk." *Maynard* v. *Cartwright*, 486 U.S. 356, 361 (1988). See *Rose*, 423 U.S. at 50. Section 1505 alerted Poindexter to such a risk here.

B. The Court of Appeals Misapplied the Requirements of *Kastigar*

The constitutional error committed by the court of appeals did not end with its invalidation of Section 1505.

Sess. 18 & n.11 (1982). The catchall provision ultimately was dropped from Section 1512 because it was "probably duplicative of [o]bstruction of justice statutes already in the books." 128 Cong. Rec. 26,810 (1982) (remarks of Sen. Heinz). This makes clear that, at a minimum, the 1982 Congress that amended Section 1505 did not share the court of appeals' view of its "transitive" nature. In contrast, the court of appeals' extensive examination (App., *infra*, 26a-29a) of the 1940 legislative history is wholly unenlightening. Congressional discussion at the time, as the court noted, "focused almost exclusively upon the need to protect witnesses." *Id.* at 27a. But by its plain terms the statute was designed to serve a broader purpose, since only the first of its two clauses dealt with witness protection. In addition, as Chief Judge Mikva explained below, "it is absurd to point, as the majority does, to Senator O'Mahoney's statement that the bill did not intend to restrict the rights of witnesses appearing before Congress, *see* App., *infra*, 28a (citing 84 Cong. Rec. at 10526 (1939)), as evidence that the bill did not intend to criminalize a witness's violation of his legal duty. A witness has never had the right to violate his legal duty—especially his duty not to lie." App., *infra*, at 54a.

The court compounded that mistake by holding that *all* of Poindexter's convictions must be set aside because of what it perceived to be the possibility that some of his immunized disclosures might have affected his trial. In reaching this conclusion, the court reaffirmed its view, first expressed in North, that a prohibited "use" occurs if a witness's recollection is refreshed or in any way affected by exposure to immunized testimony. App., *infra*, at 8a. The decision below added to this substantive standard a procedural requirement of unparalleled strictness: it effectively held that a witness whose trial testimony was not "canned" and who was exposed to immunized disclosures will not be permitted to take the stand at trial unless he "persuasively claim[s] that he can segregate the effects of his exposure." App., *infra*, 16a.[16]

These procedural and substantive holdings will pose enormous obstacles to the prosecution of any case in which immunized testimony has been disseminated publicly—including, most notably, those in which Congress has found the use of public immunized testimony necessary to fulfill its oversight responsibilities. Because the approach taken below cannot be reconciled with the holdings of this and other courts, because it affects important activities of a coordinate branch of government, and because its patent illogic does not in any way advance the policies of the Fifth Amendment, review by this Court is warranted.

1. The court of appeals stated its procedural holding in modest terms: focusing on North's testimony, it said "only that where a substantially exposed witness does not persuasively claim that he can segregate the effects of his exposure, the prosecution does not meet its burden merely by pointing to other statements of the same witness that were not themselves shown to be untainted."

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[16] The court capped these rulings with an extraordinary refusal to remand for further factfinding, "decid[ing] that even though the proper *Kastigar* standards were not enunciated until after the trial in this case, the special prosecutor will not get a chance to apply them." *Id.* at 55a (Mikva, C.J., dissenting in part).

App., *infra*, 16. But while it is difficult to quarrel with that statement in the abstract, the real effect of the holding below is dramatically broader. In fact, the court held that the government could not carry its burden by pointing either to persuasive evidence that a witness was lying when he denied having an untainted recollection of the relevant events or to other forms of circumstantial indicia that the witness had not been affected by the immunized testimony. It bears emphasis that the court of appeals decided more than that the district judge applied the wrong standard in assessing such evidence; by refusing to remand the case, the court concluded as a matter of law that such evidence *never* may be used to carry the government's burden under *Kastigar*. It thus is manifest that, under the court's rule, a witness whose testimony has not been "canned" and who asserts that he has been affected by exposure to immunized disclosures will not be permitted to testify at trial, no matter how improbable or internally inconsistent his claim.

This holding, as Chief Judge Mikva noted, "proclaims a very troubling guideline: * * * The Court today tells future defendants that all they need to evade responsibility is a well timed case of amnesia." App., *infra*, 50a. Needless to say, that rule will have significant practical consequences. It will make almost impossible the prosecution of any case involving public immunized statements that requires testimony by persons sympathetic to the accused, such as co-conspirators or other associates. And the dangers of abuse and manipulation are magnified by the court of appeals' view, expressed in *North*, that a witness inclined to assist the defense may become disqualified from testifying at trial by the simple expedient of soaking *himself* in the defendant's immunized statements.[17] A rule carrying such consequences should be

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[17] As the court of appeals put it, persons sympathetic to the defense "could have held evening classes in 'The Parsing and Deconstruction of *Kastigar*' for the very purpose of 'derailing' the [Independent Counsel's] prosecution, and such a curriculum would have been simply irrelevant to the question of whether or not the

established only if compelled by the Fifth Amendment. Yet the approach taken by the court of appeals finds no support at all in that provision.

2. At the pretrial *Kastigar* hearing, North testified that he was unable to identify *any* subject as to which he had an intact memory. App., *infra*, 83a. An important element of the district judge's decision nevertheless to admit North's testimony was his conclusion that North lied as part of a "calculated course of attempting to assist his former colleague and co-defendant." *Id.* at 133a. See *id.* at 84a (North's claim "inherently incredible"). While the court of appeals did not set aside this credibility determination—which was based both on North's "evasive, disingenuous, and argumentative" demeanor (*id.* at 85a) and on objective indicia in his testimony suggesting that he had an independent recollection (see *id.* at 86a-89a & n.48, 130a-131a)—it held that the district court's finding that North lied when he denied having an untainted memory could not be used as affirmative proof that North *did* have an untainted memory. See *id.* at 15a.

That conclusion, however, is insupportable. As this Court has explained, quoting a famous observation of Judge Learned Hand, demeanor evidence

> "may satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies."

NLRB v. *Walton Mfg. Co.*, 369 U.S. 404, 408 (1962) (per curiam), quoting *Dyer* v. *MacDougall*, 201 F.2d 265, 269 (2d Cir. 1952). See also *Sonnentheil* v. *Christian Moerlein Brewing Co.*, 172 U.S. 401, 406, 408 (1899).

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prosecution's case made *use* of North's compelled testimony." *North I*, 910 F.2d at 865 (emphasis in original).

Courts and commentators accordingly agree that, at least where some objective evidence (such as inconsistencies in the witness's story) supports the conclusion that the witness is lying, "a factfinder may find a proposition to be true solely on the basis of a witness' demeanor in testifying to the contrary of that position." Friedman, *Route Analysis of Credibility and Hearsay*, 96 Yale L.J. 667, 735 n.134 (1987). Accord, *e.g.*, *United States* v. *Cisneros*, 448 F.2d 298, 305-306 & n.10 (9th Cir. 1971); *Wood* v. *Commissioner*, 338 F.2d 602, 605 (9th Cir. 1964); J. James & J. Hazard, *Civil Procedure* § 7.11, at 344-345 (3d ed. 1985); J. Weinstein & M. Berger, *Weinstein's Evidence Manual* ¶ 6.01[03], at 6-5 & n.3 (1992); Schnapper, *Judges Against Juries—Appellate Review of Federal Civil Jury Verdicts*, 1989 Wis. L. Rev. 237, 267. Cf. Wellborn, *Demeanor*, 76 Cornell L. Rev. 1075, 1103 (1991). The court of appeals therefore was simply wrong in holding that the government could not use North's prevarication to buttress its affirmative case.

3. There is a similar failure of logic in the court of appeals' evident conclusion that lack of taint may be established only by "canning" evidence or through a witness's affirmative testimony "that he can segregate the effects of his exposure" to immunized statements. App., *infra*, 16a. Surely, for example, trial testimony that did not overlap with the subject matter of the defendant's immunized disclosures, or that disagreed with statements made in those disclosures, or that elaborated upon them, could not have been substantially influenced by the immunized statements. Indeed, it occasionally will be clear simply from the especially memorable character of the events involved that some trial testimony could not have been influenced by the immunized statements. To offer a trivial example, Poindexter's colleagues surely had intact recollections that Poindexter had served as National Security Advisor even after they heard his immunized testimony to that effect.

It is not farfetched to suppose that these elements often will be present in cases such as this. Indeed, the district

court expressly found *all* of these indicia that North had an independent recollection. It found—in findings that were not disturbed by the court of appeals—that North's testimony went well beyond, and in some significant respects differed from, that offered by Poindexter. See, *e.g.*, App., *infra*, 86a-89a, 130a-131a. It found powerful evidence that North lied when he asserted at the *Kastigar* hearing that he saw Poindexter destroy a document but did not realize at the time that the document was the Presidential Finding; the court found that assertion inconsistent with (and less credible than) North's description at his own trial of contemporaneous discussions making clear that both he and Poindexter were well aware that the document being destroyed was the finding. *Id.* at 86a n.44.[18] And the district judge found it "inherently incredible" that North "did not remember his participation in an event that he witnessed first hand and that

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[18] This is a clear example of the manner in which circumstantial evidence may be marshalled to establish that a recalcitrant witness in fact has an independent recollection of events. North's claim at the *Kastigar* hearing (and Poindexter's principal claim on appeal, see CA Br. 68) was not that North's memory regarding destruction of the finding had been *refreshed* by Poindexter's immunized testimony; instead, North claimed that he did not, at the time, understand the document whose destruction he witnessed *to be* the finding. See page 6, *supra*. Yet when asked at his own trial whether the finding destroyed by Poindexter had been the original document, North responded: "That's what I *understood*, yes. It may have been a copy but I *believed* it to be the original." JA 1161 (emphasis added). North added that "I honestly don't know whether I *understood* that to be the only copy or not." JA 1162 (emphasis added). These plainly were references to North's understanding at the time of the destruction of the finding. Indeed, when asked whether the three people present at the finding's destruction (Poindexter, North, and another of Poindexter's aides) had discussed "whether it was a good idea to rip up an original and, for all you knew, only copy of a presidential document," North responded that, "[a]s I recall, the discussion focused solely on the fact that the replacement finding supplemented or succeeded it, and that *this finding* was no longer valid. It was no longer valid and it hadn't been." JA 1163 (emphasis added). This discussion hardly could have taken place had North not been aware that the document involved was the 1985 finding.

was as dramatic, indeed historic, as the tearing up of an extremely rare Presidential Finding, and one, moreover, that authorized the covert sale of arms to Iran where the Ayatollah Khomeini was still in power." *Id.* at 84a. It is difficult to understand how a rule that wholly discounts such factual findings serves the purposes of the Fifth Amendment.

4. In applying its substantive standard, which prohibits " '*any* use' " of immunized testimony in a manner that refreshes a trial witness's memory or affects his account (App., *infra*, 8a, quoting *North I*, 910 F.2d at 861 (emphasis in original)), the decision below also went beyond the holding in *North*—which itself had been "the most expansive reading of the Fifth Amendment to date regarding the evidentiary use of immunized testimony." *United States* v. *Helmsley*, 941 F.2d 71, 82 (2d Cir. 1991), cert. denied, 112 S. Ct. 1162 (1992). In *North*, the court found what it believed to be evidence that a witness changed his account after exposure to immunized testimony. See *North II*, 920 F.2d at 944 & n.5. Here, the court was unable to point to any concrete reason to believe that witnesses had been affected by the immunized disclosures. Instead, the court held that the entirety of North's testimony was inadmissible because of the abstract possibility that "North's repeated exposure to [Poindexter's] testimony in some way influenced North's recollection." App., *infra*, 15a. Indeed, the court of appeals accepted Poindexter's contention that the government " 'must demonstrate affirmatively that the immunized testimony did not * * * [have] an influence on [the trial witnesses'] thinking, even one for which they cannot at this time consciously account.' " *Id.* at 10a (citation omitted).

Realistically, the government almost never will be able to satisfy this standard. Yet it surely is too broad. After all, it usually will be the case that even a witness who has been immersed in immunized testimony will have a residuum of untainted memory; the court of appeals itself seemed to acknowledge as much, noting that the

district court properly could have "reject[ed] as incredible an assertion, had North made it, that he remembered little or nothing of events in which he personally participated for more than a year." App., *infra*, 15a. Similarly, details of a witness's testimony that differ from or add to the immunized disclosures seemingly could not have been influenced by those disclosures.[19] It is impossible to see the purpose served by entirely excluding testimony by such a witness simply because the government cannot demonstrate the absence of subconscious and inarticulable taint.

Similarly, the court of appeals' draconian approach is unwarranted even as applied to those witnesses whose evidence might not have been available (at least in the precise form in which it was presented to the jury) in the absence of the immunized testimony. In assessing assertions that evidence must be excluded as the product of a constitutional violation, the Court repeatedly has "rejected a 'but for' approach to the admissibility of such statements." *Rawlings* v. *Kentucky*, 448 U.S. 98, 106 (1980). It has done so in the Fourth Amendment setting, for example, explaining that the test in such cases is "whether the chain of causation proceeding from the unlawful conduct has become so attenuated or has

---

[19] The court of appeals rejected that proposition here. Noting the district judge's ruling that "any of North's testimony that either elaborated upon or contradicted Poindexter's testimony could not, 'by definition,' be tainted and thus was admissible," the court observed: "That a witness proffers a more detailed account than, or a rebuttal of, the defendant's immunized testimony may demonstrate 'personal knowledge' in the evidentiary sense; but it simply does not rule out the possibility that the witness's memory was refreshed or influenced by the immunized testimony." App., *infra*, 11a (citation omitted). The court of appeals offered absolutely no rationale for this *ipse dixit*, however. In fact, determining whether refreshment or influence occurred in such circumstances requires a case-by-case inquiry; in combination with other indicia (such as, in this case, a finding that the witness lied in claiming that he was influenced by exposure), differences between the witness's testimony and the immunized disclosures may well support a finding that the witness had an untainted memory.

been interrupted by some intervening circumstance so as to remove the 'taint' imposed upon that evidence by the original illegality." *United States* v. *Crews*, 445 U.S. 463, 471 (1980). See *Wong Sun* v. *United States*, 371 U.S. 471, 487-488 (1963); *Nardone* v. *United States*, 308 U.S. 338, 341 (1939). The Court also has squarely rejected a " 'but for' analysis" under the Fifth Amendment (*United States* v. *Apfelbaum*, 445 U.S. 115, 125 (1980)), finding attenuation concepts applicable there as well. See *Nix* v. *Williams*, 467 U.S. 431, 442 (1984); *Pillsbury Co.* v. *Conboy*, 459 U.S. 248, 278-279 n.3 (1983) (Blackmun, J., concurring in the judgment); *United States* v. *Bayer*, 331 U.S. 532, 540-541 (1947). These attenuation notions plainly also have force in cases under Section 6002, which was intended to mirror the Fifth Amendment privilege. See *Kastigar*, 406 U.S. at 461.

With this in mind, exposure of a witness to immunized disclosures that happen either to refresh his recollection or to shape his testimony in some subliminal way, especially when not the product of prosecutorial contrivance, is too remote a "use" to require exclusion of the witness's evidence. Because the witness in such a case (as in this one) testifies from his own present and independent recollection of events, the immunized statements are not themselves placed before the jury. Because the government in such a case (as in this one) finds all of its witnesses without reference to the immunized testimony, that testimony does not function as a "link in the chain of evidence." *Doe* v. *United States*, 487 U.S. 201, 208 n.6 (1988). And because the prosecutors in such a case (as in this one) never themselves have seen the immunized statements, the case is hardly one in which the evidence is obtained " 'by exploitation of that illegality.' " *Wong Sun*, 371 U.S. at 487-488 (citation omitted).

In this light, it is not at all surprising that the court of appeals' holdings in *North* and this case are wholly unprecedented. While there have been any number of prosecutions of persons whose immunized testimony was

widely disseminated,[20] until the decisions here and in *North* no court had raised the possibility that refresnment of recollection or similar subtle effects might be a bar to the introduction of evidence. To the contrary, in related settings it generally has been understood that "illegally obtained evidence may be used to refresh a witness' memory." *United States v. Kusek*, 844 F.2d 942, 949 (2d Cir.), cert. denied, 488 U.S. 860 (1988). The court below offered no sound reason to depart from that practice here.

Yet the court of appeals' substantive Fifth Amendment ruling will affect many cases in which the defendant is prosecuted after the dissemination of immunized testimony. And it will have its most profound impact on cases involving public immunized testimony before Congress—cases that, by definition, involve issues of the most fundamental import. If the court of appeals has erred, this Court should right that error before significant further damage is done to the legislative oversight function. In any event, given the nature of the cases affected by the decision below and the impact of that decision upon the operations of a coordinate branch of government—as well the tension between the ruling below and this Court's application of attenuation concepts in closely analogous settings—it is imperative that the issues addressed by the court of appeals be settled by this Court.

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[20] See, *e.g.*, *United States* v. *Biaggi*, 909 F.2d 662, 689-690 (2d Cir. 1990), cert. denied, 111 S. Ct. 1102 (1991); *United States* v. *Serrano*, 870 F.2d 1, 13 (1st Cir. 1989); *United States* v. *Romano*, 583 F.2d 1, 4 (1st Cir. 1978). In other cases, immunized testimony otherwise became known to grand jury or trial witnesses. See, *e.g.*, *United States* v. *Lipkis*, 770 F.2d 1447, 1451 (9th Cir. 1985); *United States* v. *Byrd*, 765 F.2d 1524, 1526-1527, 1529 (11th Cir. 1985); *United States* v. *Rogers*, 722 F.2d 557, 560 (9th Cir. 1983), cert. denied, 469 U.S. 835 (1984).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1992

APPENDIX

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person * * * shall be compelled in any criminal case to be a witness against himself.

18 U.S.C. 1505 provides in relevant part:

> Whoever corruptly * * * influences, obstructs, or impedes or endeavors to influence, obstruct or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress—
>
> Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C. 6002 provides in relevant part:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—
>
> (1) a court or grand jury of the United States,
>
> (2) an agency of the United States, or
>
> (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,
>
> and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

No. 92-591

Supreme Court, U.S.
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OCT 5 1992
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In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN M. POINDEXTER, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 28, 1991 Decided November 15, 1991

No. 90-3125

UNITED STATES OF AMERICA

v.

JOHN M. POINDEXTER, APPELLANT

Appeal from the United States District Court
for the District of Columbia

(CR 88-00080-01)

Keith A. Jones, with whom *Richard W. Beckler*, *Joseph T. Small, Jr.*, *Stephen M. McNabb*, *Frederick Robinson*, *Michael G. McGovern*, and *Susan C. Maxson* were on the brief for appellant.

Andrew L. Frey, Attorney, Office of Independent Counsel, with whom *Lawrence E. Walsh*, Independent Counsel, *Christian J. Mixter*, and *Louise R. Radin*, Attorneys, OIC, were on the brief for appellee.

Kate Martin, *C. Douglas Floyd*, *Kevin R. Sullivan*, and *Craig E. Stewart* were on the brief for American

Civil Liberties Union, *amicus curiae*, in support of appellant.

Before MIKVA, *Chief Judge*, D. H. GINSBURG and SENTELLE, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* D. H. GINSBURG.

Dissenting opinion filed by *Chief Judge* MIKVA.

D. H. GINSBURG, *Circuit Judge*: John M. Poindexter was convicted on five felony counts arising from the part he played, while National Security Advisor, in the so-called "Iran/Contra Affairs," *see United States v. North*, 910 F.2d 843, 851 (*"North I"*), *modified*, 920 F.2d 940 (D.C. Cir. 1990) (*"North II"*). We reverse as to all counts because the Independent Counsel (IC) has not carried his burden of showing that Poindexter's compelled testimony was not used against him at his trial in violation of 18 U.S.C. § 6002 and the Fifth Amendment of the Constitution. We also reverse as to the two counts for violating 18 U.S.C. § 1505, on the ground that the statute as written cannot constitutionally be applied to some of the conduct, specifically lying to or misleading the Congress, with which Poindexter is charged in those counts. On the other hand, we reject Poindexter's argument that he cannot be penalized under § 1001 for making false statements to the Congress. The case is remanded to the district court for such further proceedings on the indictment as the IC may pursue. *See* Part II.C below.

I. FACTS

A. *Support of the Contras*

In 1984 the Congress passed the so-called Boland Amendment, which prohibited United States intelli-

gence agencies from providing military support to the rebel "Contras" then attempting to overthrow the "Sandinista" government of Nicaragua. In 1985 during the tenure of National Security Advisor Robert McFarlane, National Security Council staff member Oliver North and others became involved in a plan to give military advice and fund-raising aid to the Contras. In August of that year McFarlane responded to congressional inquiries with letters falsely stating that neither North nor anyone else on the NSC staff was providing such assistance. Poindexter succeeded McFarlane as National Security Advisor in December; during his one year in that position North and others, with Poindexter's knowledge, continued the Contra support program.

House Resolution 485, a Resolution of Inquiry relating to NSC assistance to the Contras, was introduced in June 1986. On July 21, in response to requests for information, Poindexter sent letters to the chairmen of two House committees, stating that the "information" provided by McFarlane in the earlier letters had "made it clear that the actions of the National Security Council staff were in compliance with both the spirit and letter of the law regarding support of the Nicaraguan resistance." Poindexter also arranged an August 6 meeting between North and Members of the House Intelligence Committee, at which North denied giving assistance to the Contras.

B. *Arms Shipments to Iran*

Also with Poindexter's knowledge, North became involved in a plan to ship missiles from Israel to Iran in November 1985. In December of that year President Reagan made a written "Finding," pursuant to the Foreign Assistance Act of 1961, 22 U.S.C.

§ 2422, retroactively authorizing the November arms shipment. The purpose of the shipment, according to the Finding, was to obtain Iran's assistance in securing the release of United States citizens being held hostage in Lebanon. In January 1986 the President made a second Finding, this one covering future shipments of arms and stating that the purpose of those shipments was to support moderate elements in the Iranian government. Additional missiles were subsequently shipped to Iran.

In November 1986 the press reported allegations that arms had been exchanged for hostages. The President then stated publicly that the arms sales had been intended to improve relations with Iran, rather than to secure the release of hostages, and he made public the second Finding.

On November 21, 1986 Poindexter had separate meetings with Members of the House and of the Senate Intelligence Committees. It is the theory of the IC prosecuting this case that "[a]n acknowledgment of United States involvement in [the November 1985 arms] shipment might have triggered a search for the initial Presidential Finding, which would have revealed the character of the transaction as an exchange of arms for hostages." Instead, the indictment alleges, Poindexter made false statements at those meetings regarding when he learned of the shipment and when he learned that others might have had prior knowledge of it. Soon after the meetings Poindexter, with North present, destroyed the first Presidential Finding.

C. *Compelled Testimony, Indictment, and Trial*

During the ensuing congressional investigation, Poindexter was compelled to testify before the Con-

gress under a grant of use immunity pursuant to 18 U.S.C. § 6002. That testimony, covering his participation in the Iran/Contra events, received extensive national press coverage.

Subsequently, the IC secured a five-count indictment against Poindexter. Count 1 alleged a conspiracy to destroy official documents in violation of 18 U.S.C. § 2071, and to commit Counts 2 through 5. Count 2 charged that Poindexter corruptly obstructed the Congress in its consideration of House Resolution 485, in violation of 18 U.S.C. § 1505. This Count specified two obstructive acts in connection with the congressional inquiry into United States aid to the Contras: (1) sending false and misleading letters to the House committees in July 1986 referring to McFarlane's earlier letters, and (2) arranging the August 1986 meeting at which North falsely denied giving military advice to the Contras.

The remaining Counts concern the arms shipments to Iran and the Congress's inquiry into them. Counts 4 and 5 charged violations of 18 U.S.C. § 1001, the False Statements statute. According to Count 4, during the November 21, 1986 meeting Poindexter falsely stated to Members of the House Intelligence Committee (1) that he had not learned until January 1986 that missiles had been shipped to Iran in November 1985, and (2) that he had not learned until November 20, 1986 that anyone in the United States government might have had prior knowledge of that shipment. On the same date, per Count 5, Poindexter repeated to Members of the Senate Intelligence Committee the first of those alleged falsehoods.

Count 3 charged that Poindexter corruptly obstructed the Congress's inquiry, in violation of § 1505.

The specific acts alleged were: (1) making the false statements alleged in Counts 4 and 5, (2) participating in preparation of a false chronolgy, and (3) deleting from his computer information regarding the arms shipment.

Poindexter and North were indicted together. They moved to dismiss the indictment on the ground that their immunized testimony had been used against them before the grand jury, *see Kastigar v. United States*, 406 U.S. 441 (1972), but the judge to whom the cases were initially assigned sustained the indictment. After their cases were severed, the trial judge to whom Poindexter's case was reassigned adopted the prior judge's rulings as to the indictment, but took a number of steps in order to prevent the use of Poindexter's immunized testimony against him at trial, as required by *Kastigar*. The court compared the witnesses' expected testimony with their "canned" statements (i.e., statements taken before Poindexter gave his immunized testimony) and held hearings as to five of the witnesses. All were cleared to, and three did, testify at the trial. Poindexter was convicted on all five counts.

II. Use of Immunized Testimony

Poindexter argues first that the IC "used" his immunized testimony against him, both before the grand jury and at trial, in violation of 18 U.S.C. § 6002 and the Fifth Amendment, and that therefore his convictions on all counts must be reversed.

Section 6002 provides:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or

provide other information in a proceeding before or ancillary to—

. . .

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but *no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case*, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order. [Emphasis supplied.]

The scope of immunity provided by § 6002 is coextensive with the scope of the Fifth Amendment privilege against compelled self-incrimination. *Kastigar*, 406 U.S. at 462. The Supreme Court has held that the statute "prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness." *Id.* at 453 (emphasis in original). Once a defendant demonstrates that he has previously testified under a grant of immunity about a matter relevant to the case against him, the prosecution has the burden of showing that its evidence is not tainted by establishing that it had a legitimate source for the evidence "wholly independent of the compelled testimony." *Id.* at 460. We have recently held that

a prohibited "use" occurs if a witness's recollection is refreshed by exposure to the defendant's immunized testimony, *North I*, 910 F.2d at 860-61, or if his testimony is in any way "shaped, altered, or affected," by such exposure, *id.* at 863. "*Kastigar* does not prohibit simply 'a whole lot of use,' or 'excessive use,' or 'primary use' of compelled testimony," we said. It prohibits "*any* use, direct or indirect." *Id.* at 861 (emphasis in original).

A. *The Trial Court's Standard for "Use"*

All of the witnesses at Poindexter's trial had previously been exposed to the defendant's immunized testimony, although pre-exposure statements from some of the witnesses were available. The trial court made an *ex parte* comparison of the expected trial testimony of each witness both with the witness's own canned statements and with Poindexter's immunized testimony. After determining that the bulk of the expected testimony either had been previously canned or would not relate to subjects about which Poindexter gave immunized testimony, the court held an adversarial hearing (the "*Kastigar* hearing") as to three witnesses who ultimately testified at trial, in order to inquire further into whether they had been tainted by their exposure to Poindexter's immunized testimony. The witnesses' answers at this hearing satisfied the court that they would be able to testify from personal knowledge. We do not address Poindexter's contention that the procedures followed by the trial court are inadequate under *North*, because it is clear that the convictions cannot be affirmed for another reason.

In the district court, the IC maintained that immunized testimony is not "used" if it serves only

to refresh a witness's recollection or if it merely influences his testimony, *see* Memorandum *re* Clarification of *Kastigar* Opinion, Jan. 4, 1990, at 2; Government's Memorandum of Points and Authorities in Support of Its Motion for Modification or Clarification of the Court's *Kastigar* Ruling Concerning Proposed Witness Oliver L. North, Dec. 21, 1989, at 12-16. The trial court ruled on this issue before this court issued its opinions in *North*; and it is apparent in the record that its standard for "use" was not so broad as we held in *North* that the law requires. Indeed, during the *Kastigar* hearing, the court expressly rejected the defense's argument for a broad interpretation of "use" not unlike the one we later applied in *North*:

> The Court: The purpose of this hearing is to determine whether there are independent leads, or independent knowledge, by the witness to matters which Admiral Poindexter testified to in his immunized statements before the Congress. If it has nothing to do with that, it's not relevant to this hearing.
>
> . . .
>
> Defense counsel: [T]he Government . . . is not making any attempt—and it has the burden to go forward—to show what [the witness] is saying right now, as he sits there on that stand—whether it comes directly out of his memory of his actual dealings with Admiral Poindexter prior to the hearings, or whether what's coming out of his mouth right now is *in any way, shape or position colored* by Admiral Poindexter's testimony. That's the same problem that Your Honor is addressing. That should be dealt with

> by the government as its burden to open this hearing.
>
> The Court: What I am addressing is not at all what you're addressing.

Transcript of *Kastigar* Hearing, Dec. 11, 1989, at 23-24 (emphasis supplied).

In its opinion on the *Kastigar* issue, the court said of its standard for "use":

> [Poindexter argues] that whatever instruction may have been given to . . . witnesses, or whatever the evidence may indicate with respect to the independence of a witness' testimony in relation to Poindexter's immunized testimony in Congress, the government must demonstrate affirmatively that the immunized testimony did not, somehow, in some way, come to the attention of the witnesses . . . and [have] an influence on their thinking, even one for which they cannot at this time consciously account. The Court rejects this absolutist approach.

United States v. Poindexter, 727 F. Supp. 1488, 1491-92 (D.D.C. 1989). *See also id.* at 1493; Transcript of *Kastigar* Hearing, Dec. 11, 1989, at 6-8.

The court's various applications of its standard even more clearly betray a conception of "use" much narrower than ours in *North*. For example, the court ruled that witness Kenneth deGraffenried could testify even though he had repeatedly stated during the *Kastigar* hearing that Poindexter's immunized testimony had "strengthened" his "hazy recollection" of events. 727 F. Supp. at 1499 & n.32; *see also* Transcript of *Kastigar* Hearing, Dec. 11, 1989, at 129-31, 133-34. In gauging the admissibility of wit-

ness Oliver North's testimony, the court likewise suggested the view that if an exposed witness also has personal knowledge about a matter, then admission of his testimony involves no "use" (or at least the defendant bears the burden of proving that the witness' testimony does draw upon the defendant's immunized testimony). Early in the proceedings, the court ruled that any of North's testimony that either elaborated upon or contradicted Poindexter's testimony could not, "by definition," be tainted and thus was admissible. Memorandum *re* Clarification of *Kastigar* Opinion, Jan. 4, 1990, at 3-4; *see also* Memorandum *re* Testimony of Oliver North, Mar. 8, 1990, at 6-7; Opinion Denying Defendant's Motion for Judgment of Acquittal or for a New Trial, May 29, 1990, at 38; Transcript of *Kastigar* Hearing, Dec. 11, 1989, at 6-8. That a witness proffers a more detailed account than, or a rebuttal of, the defendant's immunized testimony may demonstrate "personal knowledge" in the evidentiary sense; but it simply does not rule out the possibility that the witness's memory was refreshed or influenced by the immunized testimony.

Whatever the exact contours of the district court's legal standard for "use" under § 6002, its view was clearly too narrow to permit us to defer to its ultimate factual finding on this issue. We conclude below, moreover, that remand for new findings under the *North* standard, or for further hearings concerning taint, would be pointless because the record plainly demonstrates that the IC has neither met his burden of proof nor indicated that there might be any additional evidence that he could put forward in order to meet that burden.

B. *North's Testimony*

The testimony of several of the witnesses may have been prejudicially influenced by their exposure to Poindexter's immunized testimony. The record is clear enough with regard to the admission of North's testimony, however, to compel reversal without regard to whether the testimony of any other witness was tainted.

North was extensively exposed to Poindexter's immunized testimony prior to either one's being tried. At Poindexter's *Kastigar* hearing North recounted:

> I watched it on television as it happened. . . .
>
> I reviewed what was written in the papers, and the clippings we had. I, of course, watched it on the newscasts as it was being given; and reviewed it with counsel in preparation for what we anticipated eventually happened.
>
> Then we went through that entire process again as I prepared for my trial, so that we would be able to introduce evidence that we believed would be helpful to my defense.

Transcript *Kastigar* Hearing, Dec. 12, 1989, at 370-71. He had "spent literally days with the testimony as it happened, and then afterwards, and then again in preparation" for his trial. *Id.* at 379. When asked whether he could segregate the effects of his exposure on his current recollection, he stated, "I cannot tell you here today—nor could I have told you in my trial —that what I said was not the product of both having lived through [the events about which he was to testify] and having refreshed myself and having studied it very carefully." *Id.* at 178.

The trial court nevertheless permitted North to give testimony at Poindexter's trial that went well beyond any statements that had been canned prior to his exposure. In particular, the trial court ruled that North could—indeed, that he was required to—testify that Poindexter had destroyed the initial Presidential Finding, on the ground that he had so testified at his own trial:

> [IC:] And you are certain, as you sit here before this jury, you know, do you not, that Finding you saw John Poindexter destroy, it was the Finding, the one signed by the President that had the politically embarrassing language in it, you know that, do you not?
>
> [North:] I need help here.
>
> The Court: Yes.
>
> [North:] I am trying to remember your specific instruction to me as we started this, Your Honor, several days ago about certain aspects of other people's testimony.
>
> The Court: Oh. Well, you better not go into other people's testimony. Just from what you know of your own knowledge. You were there.
>
> [North:] Yes, I was.
>
> [IC:] In your own trial did you testify very definitely what you saw him destroy was the one with the politically embarrassing language?
>
> [North:] I did not have that same instruction in my trial, counsel.

> [IC:] Your Honor, there has been a pretrial ruling on this matter.
>
> The Court: In a pretrial ruling I have ruled that your testimony at your trial where you said you were present and saw him tear it up is the credible testimony, the only credible testimony you are giving on this subject and I want you to follow that up.
>
> [IC:] Do you recall in your own trial testifying under oath that the finding you saw him destroy was very definitely the one that contained the politically embarrassing language?
>
> [North:] Yes.

Trial Transcript, Mar. 12, 1990, at 1253-54.

Because the trial court applied its narrower standard for "use," it never made a finding that North's recollection (either at the time of his own trial or later at Poindexter's trial) was not refreshed or otherwise "shaped, altered, or affected" by his exposure to Poindexter's immunized testimony. And in view of North's immersion in that testimony (the effects of which he does not claim to be able to segregate), it would be clearly erroneous to hold that the IC met his "heavy burden," *Kastigar*, 406 U.S. at 461, of demonstrating that North's testimony was *not* influenced by Poindexter's immunized statements to the Congress. *See North II*, 920 F.2d at 944 (witnesses "might well testify that they simply were unable to determine just how much [the] exposure affected their testimony, in which case that uncertainty would surely be a grave problem for the party with the burden of proof—the prosecutor").

The IC argues that we must defer to the trial court's finding that North, out of loyalty to Poindexter, lied when he asserted that he was unable to segregate his own recollection from the effects of his exposure. The court would undoubtedly have been correct to reject as incredible an assertion, had North made it, that he remembered little or nothing of events in which he personally participated for more than a year. But Poindexter's claim—that there is a substantial likelihood that North's repeated exposure to his testimony in some way influenced North's recollection—is not nearly so implausible. *See North I*, 910 F.2d at 860-61 ("The District Court stated that '[t]here is no way a trier of fact can determine whether the memories of witnesses would be substantially different if [they] had not been stimulated by a bit of the immunized testimony itself[.] . . . The District Court found that 'such taint occurs in the 'natural course of events' because '[m]emory is a mysterious thing that can be stirred by a shaggy dog or a broken promise.' This observation [is] likely true.") (citations deleted). More to the point, even if North's assertion were to be given no weight, the IC would still have failed to meet his burden, which is to demonstrate that the immunized testimony did *not* influence the witness. As we recognized in *North II*, where the prosecutor has failed to "can" testimony, "it may well be extremely difficult for the prosecutor to sustain its burden of proof that a witness exposed to immunized testimony has not shaped his or her testimony in light of the exposure." 920 F.2d at 943.

In *North II* we did not, to be sure, "mean to preclude the use of any techniques of which we [were] not aware" and by which the prosecution might be

able to carry its burden. *Id.* Similarly, we now decline to adopt the suggestion of amicus American Civil Liberties Union that when a witness "has been thoroughly exposed to the defendant's immunized testimony . . . [t]he only objective and reliable indicator that can *assure* that the defendant's immunized testimony was not used against him . . . , as *Kastigar* demands, is to require that the witness' testimony be limited to that which the prosecution was able to 'can' prior to the exposure." We can and do say only that where a substantially exposed witness does not persuasively claim that he can segregate the effects of his exposure, the prosecution does not meet its burden merely by pointing to other statements of the same witness that were not themselves shown to be untainted. Such evidence is neither sufficient as a matter of first principles, nor the kind of unimagined "technique" we referred to in *North II*. *Cf. North II*, 920 F.2d at 944 (suggesting that if witness had set down his story before exposure, burden of going forward to challenge that version would shift to the defendant).

The IC has not suggested any other way in which he might meet his burden if we were to remand this case for further hearings regarding taint at trial. This is hardly surprising, though. The admissibility of North's testimony, including his testimony regarding the Presidential Finding, was hotly contested throughout the proceedings below. The IC had a full opportunity and every incentive then to make any argument and offer any evidence tending to show that North's testimony was not influenced by his exposure. It is telling that instead the IC argued to the district court that if refreshment constituted "use," then that "would deprive the Government of critical evidence

it lawfully is entitled to present," referring to "North's [trial] testimony concerning Poindexter's destruction of the signed 1985 Iran Finding[.]" Government's Dec. 21 Memorandum, at 12-16 & n.7. *See also* Government's Closing Statement, Mar. 30, 1990, Transcript at 3169 (IC refers to the Finding in his closing argument as "the most critical piece of evidence" in the case), and Government's Rebuttal, Mar. 30, 1990, Transcript at 3325 (IC links Poindexter's destruction of the Finding to Poindexter's allegedly "lying" to Congress in Summer 1986 and November 1986).

The IC has not explained (in light, that is, of the standard for "use" set out in *North*) what utility there would be in further hearings on North's testimony. *Cf. United States v. Hampton*, 775 F.2d 1479, 1491 & n.54 (11th Cir. 1985) (instructing district court to vacate conviction due to clear error in its conclusion that there was source for evidence independent of defendant's immunized testimony; appeals court's review of record shows "that a remand for a further evidentiary hearing would be unwarranted"). Therefore, Poindexter's immunized testimony having been used against him at trial through the testimony of witness North, his convictions on all counts must be reversed.

C. *The Indictment*

Poindexter also contends that the indictment is tainted because witness testimony derived from his immunized statements was presented to the grand jury. *See North I*, 910 F.2d at 854, quoting *White Collar Crime: Fifth Survey of Law—Immunity*, 26 Am. Crim. L. Rev. 1169, 1179 ("If the tainted evidence was presented to the grand jury, the indictment

will be dismissed"). This court has already found inadequate the procedures used to determine whether the indictments of Poindexter and North were tainted. *See North I*, 910 F.2d at 853-73; *North II*, 920 F.2d at 947-49. Thus, unless the IC proves on remand that the evidence received by the grand jury was untainted, or that any taint was harmless beyond a reasonable doubt, the indictment must be dismissed.

III. SECTION 1505—COUNTS 2 AND 3

The obstruction statute under which Poindexter was charged in Counts 2 and 3, 18 U.S.C. § 1505, provides in relevant part:

> *Whoever corruptly*, or by threats or force, or by any threatening letter or communication *influences, obstructs, or impedes or endeavors to influence, obstruct, or impede* the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or *the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House* or any joint committee of the Congress [s]hall be fined not more than $5,000 or imprisoned not more than five years, or both. [Emphases supplied.]

The indictment specifies that Poindexter "did corruptly influence, obstruct and impede" congressional inquiries by, among other things, making false and misleading statements to Members of the Congress. Because Poindexter does not argue that any of the other methods of violating § 1505 alleged in Counts 2 and 3 fall outside the scope of the statute and does not

request any relief from the indictment, we do not rule upon any issues specific to Counts 2 and 3 other than the sufficiency of the allegations regarding false and misleading statements.

Poindexter challenges his § 1505 convictions on the ground that use of the term "corruptly" renders the statute unconstitutionally vague as applied to this conduct. That term must have some meaning, as we recognized in *North I*, 910 F.2d at 882, because otherwise the statute would criminalize all attempts to "influence" congressional inquiries—an absurd result that the Congress could not have intended in enacting the statute. The question in this case is whether the meaning it does have is sufficiently definite, as applied to the conduct at issue on this appeal, *viz.* lying to the Congress, to be the basis of a criminal conviction. "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. General Construction Company*, 269 U.S. 385, 391 (1926). In particular, a penal statute must define the criminal offense with sufficient definiteness that ordinary people can understand what conduct it prohibits, and do so in a manner that does not invite arbitrary and discriminatory enforcement by which "policemen, prosecutors, and juries . . . pursue their personal predilections." *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983).

In response to certain different arguments that the defendant made unsuccessfully in *North I*, we quoted several modern dictionary definitions of the word "corrupt":

> "[C]orruptly" is the adverbial form of the adjective "corrupt," which means "depraved, evil: perverted into a state of moral weakness or wickedness . . . of debased political morality; characterized by bribery, the selling of political favors, or other improper political or legal transactions or arrangements." A "corrupt" intent may also be defined as "the intent to obtain an improper advantage for [one]self or someone else, inconsistent with official duty and the rights of others."

Id. at 881-82 (citations omitted). Poindexter's argument is that with "corruptly" *so defined*, the term "corruptly" is vague as used in § 1505.

We must acknowledge that, on its face, the word "corruptly" is vague; that is, in the absence of some narrowing gloss, people must "guess at its meaning and differ as to its application." More specifically, "corruptly influencing" a congressional inquiry does not at all clearly encompass lying to the Congress, which is, by way of contrast, clearly a violation of § 1001, the False Statements statute. Thus, in *Columbia v. Omni Outdoor Advertising*, 111 S. Ct. 1344 (1991), the Supreme Court recently said, in rejecting an argument that there should be a "conspiracy" exception to the antitrust immunity of municipal corporations:

> [A party] suggests . . . that "conspiracy" might be limited to instances of governmental "corruption, defined variously as "abandonment of public responsibilities to private interests," "corrupt or bad faith decisions," and "selfish or corrupt motives." Ultimately, [the party] asks us not to define "corruption" at all, but simply to leave

> that task to the jury: "[a]t bottom however, it was within the jury's province to determine what constituted corruption of the governmental process in their community." . . . A conspiracy exception narrowed along such vague lines is . . . impractical. Few governmental actions are immune from the charge that they are . . . in some sense "corrupt."

111 S. Ct. at 1352 (citations omitted). *See also Ricks v. District of Columbia*, 414 F.2d 1097, 1106-07 (D.C. Cir. 1968), in which we held unconstitutionally vague a statute making it a crime to "lead[] an immoral or profligate life." "Immoral," and its synonyms "corrupt, indecent, depraved, dissolute," we noted, afford "an almost boundless area for individual assessment of the morality of another's behavior." *Id.* at 1106.

The various dictionary definitions of the adjective "corrupt" quoted in *North I* do nothing to alleviate the vagueness problem involved in attempting to apply the term "corruptly" to Poindexter's conduct. "Vague terms do not suddenly become clear when they are defined by reference to other vague terms." *Cartwright v. Maynard*, 822 F.2d 1477, 1489 (10th Cir. 1987) (en banc), *aff'd*, 486 U.S. 356 (1988); *accord Connally*, 269 U.S. at 394-95. Words like "depraved," "evil," "immoral," "wicked," and "improper' are no more specific—indeed they may be less specific—than "corrupt.' *See, e.g., Walton v. Arizona*, 110 S. Ct. 3047, 3057 (1990) ("no serious argument [that phrase] especially . . . depraved" is not too vague on its face to be an aggravating circumstance in capital sentencing); *Ricks*, 414 F.2d at 1106. (A dictionary definition quoted in *North I* also mentions "bribery" and the like, but no such conduct is at issue on this appeal.) As used in § 1505, therefore, we find that the

term "corruptly" is too vague to provide constitutionally adequate notice that it prohibits lying to the Congress.

A. *Legislative History*

Notwithstanding the use of the facially vague term, we suppose that if the legislative history of § 1505 clearly indicates a more specific meaning of the terms "corruptly," then the statute might constitutionally be applied to conduct that comes within that meaning. *See Barenblatt v. United States*, 360 U.S. 109, 117-18 (1959) (in prosecution for contempt of Congress, House Rule authorizing investigation held not vague in light of "persuasive gloss of legislative history"); *Arnett v. Kennedy*, 416 U.S. 134, 162 (1974) (legislative purpose gives content to "for cause" discharge standard) (opinion of Rehnquist, J. for three Justices); *id.* at 164 (accord) (opinion of Powell, J. for two Justices). In *North I* we stated that "[b]ecause Congress is not shown to have intended otherwise," "corruptly" should not be stretched beyond its "usual meaning" to incorporate either an "ignorance of the law" or an "authorization" defense. 910 F.2d at 881, 883-84; *id.* at 852 (summarizing holdings). *See also Perrin v. United States*, 444 U.S. 37, 42, 42-45 (1979) (looking to ordinary meaning of term at time of enactment to interpret criminal statute). Because we are now confronted with Poindexter's vagueness argument, which is compelling when one considers only the statute on its face, it is time to consider whether the Congress "intended otherwise."

We pause first only to note that the verb "corrupt" may be used transitively ("A corrupts B," i.e., "A causes B to act corruptly") or intransitively ("A corrupts," i.e., "A becomes corrupt, depraved, impure,

etc."). So too, the adverbial form "corruptly" may have either the transitive or the intransitive sense. *See* 3 Oxford English Dictionary 974 (2d ed. 1989) ("corruptly" may mean either "by means of corruption or bribery," i.e., by means of corrupting another, or acting oneself "in a corrupt or depraved manner"). On its face, § 1505 favors the transitive reading. The other terms in the disjunctive series in which it appears are "by threats," "[by] force," and "by any threatening letter or communication," all of which are transitive—indeed all of which take as their object a natural person. In addition, to read "corruptly" in an intransitive sense as "wickedly" or "immorally" would appear to render the other methods of violating the statute superfluous: surely the use of force to influence a congressional inquiry would always be "wicked" or at least "immoral."

Either a transitive or an intransitive interpretation would still be unconstitutionally vague, however, if more specific content is not given to the word "corruptly." Reading "corruptly" to prohibit one from influencing another to act "immorally" or "improperly" provides no more guidance than does reading it to prohibit one from acting "immorally" or "improperly" oneself. Narrowing the transitive interpretation to include only "corrupting" another person by influencing him to *violate his legal duty* would both take account of the context in which the term "corruptly" appears and avoid the vagueness inherent in words like "immorally." But that interpertation, which for convenience we shall refer to as the "subornation" interpretation of the statute, would not cover the conduct of Poindexter at issue on this appeal.

With all this in mind, we turn to the legislative history of the statute. We do so in search of a narrowing interpretation that does apply to Poindexter's conduct (specifically, to lying) and that does so clearly enough to have put a reasonable person on notice that the statute applies.*

1. *The Origins of § 1505 and § 1503*

The core of the statute that is now § 1505 was passed in 1940. The terms of § 1505 were borrowed from a 1909 statute that has since become § 1503, an "obstruction of justice" statute not directly implicated in this case. The 1909 statute, codified at § 241 of the Criminal Code, read:

> *Whoever corruptly, or by threats or force,* or by any threatening letter or communication, *shall endeavor to influence, intimidate, or impede any witness, in any court* of the United States or before any United States commissioner or officer acting as such commissioner, *or any grand or petit juror, or officer in or of any court* of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner, *in the discharge of his duty, or who corruptly or by threats or force,* or by any threatening letter or communication, *shall influence, obstruct, or imepde* [sic], or endeavor to influence, obstruct, or impede, *the due*

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* Our dissenting colleague suggests that as he would redefine the vague term corruptly—"i.e. acting in a manner inconsistent with a legal duty"—it is sufficiently clear to pass constitutional muster. Dis. Op. at 6-7. The question before the court is not, however, whether we can now rewrite the statute to make it clear, but whether the defendant was fairly on notice of its meaning when he acted.

> *administration of justice therein,* [violates the statute].

Act of March 4, 1909, ch. 321, § 135, 35 Stat. 1113 (1909) (emphases supplied). That statute in turn derived from a similarly worded contempt statute of 1831. *See* Nelles & King, *Contempt by Publication in the United States*, 28 Colum. L. Rev. 401, 430-31 (pt. I), 525 (pt. II) (1928). There is some indication that the term "corruptly" in the 1831 and 1909 statutes was understood to apply to actions that "corrupted" another person, rather than to actions that manifested the actor's own "corrupt" nature:

> [The] National Intelligencer (a newspaper whose reports formed the basis of the same publishers' Register of Debates) for Mar. 3, 1831, reports the following proceedings in the House on Mar. 2:
>
> > The Senate's Amendment to the Act declaratory of the powers of the Courts of the United States on the subject of contempts; adding a second section for punishing all attempts *to corrupt or intimidate jurors*, etc., was amended on the suggestion of Mr. Buchanan, and then agreed to.

Id. at 531 n. 24 (emphasis altered). *See also United States v. Russell*, 255 U.S. 138, 141, 143 (1921) (using "corruptly endeavoring to influence" a juror and "corruption of a juror" interchangeably in construing § 241).

Section 241(a), the predecessor of § 1505, was passed in 1940 in order to supplement the prohibition of § 241 with a parallel provision applicable to conduct affecting proceedings before administrative agencies and the Congress. It followed the language of § 241 very closely:

> That [1] whoever corruptly, or by threats or force, or by any threatening letter or communication, shall endeavor to influence, intimidate, or impede any witness in any proceeding pending before any department, independent establishment, board, commission, or other agency of the United States, or in connection with any inquiry or investigation being had by either House, or any committee of either House, or any joint committee of the Congress of the United States, or [2] who corruptly or by threats or force, or by any threatening letter or communication shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede [a] the due and proper administration of the law under which such proceeding is being had before such department, independent establishment, board, commission, or other agency of the United States, or [b] the due and proper exercise of the power of inquiry under which such inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress of the United States [violates the statute].

Act of January 13, 1940, ch. 1, § 135(a), 54 Stat. 13 (1940).

Section 241(a) contained two clauses. The first covered influencing a witness in a proceeding before an administrative agency or either House or a committee of the Congress; note that this clause did not apply to an attempt to influence an officer (nor, of course, a juror). The second clause, which came later to be known as the "omnibus" clause, covered influencing [a] "the due and proper administration of the law" in a proceeding before an agency, and [b]

"the due and proper exercise of the power of inquiry" by either House or a committee of the Congress.

The Senate and House Reports and the floor debates concerning § 241(a) focused almost exclusively upon the need to protect witnesses. Both reports state that the

> proposed legislation simply extends the protection now provided by law for witnesses in Court proceedings [under § 241], to witnesses in proceedings before either House of Congress or committees of either House (or joint committees), and to witnesses in proceedings before administrative agencies of the Government. The need of outlawing intimidation and corruption applies to every witness.

H.R. Rep. No. 1143, 76th Cong., 1st Sess. 1 (1939); S. Rep. No. 1135, 76th Cong., 1st Sess. 1 (1939).

On the floor of the House, the bill's sponsor stated that it "simply . . . outlaws intimidation, coercion, and corruption of other witnesses, just exactly as existing law protects witnesses called to testify in courts." *See* 84 Cong. Rec. 9312 (1939) (Rep. Hobbs). References to the need to protect non-court witnesses were made throughout the debates in both chambers. *See id.* at 10526, 10910, 10911, 10912. There is no indication in the legislative history, however, that the law was meant to regulate the conduct of the witness himself when he testified before an agency or the Congress; only his oppressor (or corruptor) was affected by this section.

Indeed, when Senator Johnson objected that the language of the bill was broad and might "give to any board, any agency, or any department the right

to do things that ought not to be done," Senator O'Mahoney, a member of the subcommittee to which the bill had been referred, assured him that the bill granted no power to the agencies. On the contrary, as a third Senator explained, the bill was meant to protect witnesses from congressional committees and boards who were "mercilessly muckrak[ing]" those witnesses. *Id.* at 10911. Senator O'Mahoney continued:

> I share completely the Senator's sympathy for the witness called before any group, and it is because I have such sympathy that I am urging passage of this bill. Let me give the Senator an example how it would work. At the present time, if a witness should be called before the Interstate Commerce Commission, some person not a witness before that Commission could with complete impunity threaten him that if he testified to the truth he would lose his job, for example, and there would be no recourse. This bill provides that, if any person should so threaten such a witness, such person would be guilty of a criminal offense[.] That is all the bill does.

Id. at 10912. Senator Johnson persisted: although a "logical" mind might give the bill that interpretation, he feared that the courts might read the bill to protect government departments, rather than witnesses. Once again Senator O'Mahoney answered that such an interpretation was unwarranted. *Id.* Similarly, in the House, when Rep. Celler was asked whether the bill contained any clause that would "in any way restrict the rights of any witness appearing before any committee of the Congress," he replied, "None whatsoever." *Id.* at 10526.

In sum, there is no indication that the Congress believed that the second or omnibus clause of § 241(a) would, by way of its "corruptly" language (or otherwise), make criminal a witness' violation of his own legal duty or "in any way restrict the rights of any witness appearing before any committee of the Congress." *Id.*

In 1948, § 241(a) was recodified at 18 U.S.C. § 1505, under the heading "Influencing or injuring witness before agencies and committees," Act of June 25, 1948, ch. 645, 62 Stat. 770 (1948), which heading was changed in 1962 to "Obstruction of proceedings before departments, agencies, and committees," Antitrust Civil Process Act, 76 Stat. 551 (1962). Minor alterations in wording and other amendments of no apparent relevance to the issue under consideration occurred both before and after the 1948 codification.

2. *The Witness Protection Act of 1982*

The Victim and Witness Protection Act of 1982 created a new provision, § 1512, which prohibits various forms of witness tampering, including many activities that were formerly prohibited by §§ 1503 and 1505. In order to effect that transfer, the Act also deleted the word "witness" from § 1503 and deleted the first clause (prohibiting corruptly etc. influencing etc. a witness) from § 1505. It left the omnibus clause of each statute intact.

The Senate Report contains a number of statements reflecting the Judiciary Committee's understanding of §§ 1503 and 1505 as they then were and would continue to be even if the Senate bill passed:

> Current law requires a relatively high threshold of seriousness for commission of a crime. For

> instance, section 1503 requires corruption, threats or force as elements as [sic] the offense of influencing a witness. [It does not] proscribe conduct knowingly and maliciously hindering, delaying, preventing or dissuading testimony.

S. Rep. No. 532, 97th Cong., 2d Sess. 14 (1982). Similarly, the report stated that "verbal harassment" was not covered under § 1503, "which requires corruption, threats or force for an offense." *Id.* at 15. These statements strongly suggest that, at least as used in § 1503 but presumably also in § 1505, "corruption" is something more specific than simply "any immoral method used to influence a proceeding."

The original Senate version of § 1512 contained its own omnibus clause, which closely paralleled the language of §§ 1503 and 1505:

> (a) Whoever . . . (3) corruptly, by threats or force, or by any threatening letter of [sic] communication, intentionally influences, obstructs or impedes, or attempts to influence, obstruct or impede the (A) enforcement and prosecution of Federal law; (B) administration of a law under which an official proceeding is being or may be conducted; or (C) exercise of a Federal legislative power of inquiry [violates the statute].

128 Cong. Rec. 26,360 (1982). The Senate Report explained the purpose of this clause:

> ["]The obstruction of justice statute is an outgrowth of Congressional recognition of the variety of corrupt methods by which the proper administration of justice may be impeded or thwarted, a variety limited only by the imagination of the criminally inclined. ["(quoting *Catrino v. United States*, 176 F.2d 884, 887 (9th Cir. 1949)]

> In the Committee's view, this observation leads to the conclusion that the purpose of preventing an obstruction or miscarriage of justice cannot be fully carried out by a simple enumeration of the commonly prosecuted obstruction offenses. There must also be protection against the rare type of conduct that is the product of an inventive criminal mind and which also thwarts justice.

S. Rep. No. 532, 97th Cong., 2d Sess. 18 (1982). The report listed some examples of behavior "actually prosecuted under the current residual"—presumably omnibus—"clauses, which would probably not be covered in this series without a residual offense clause," such as a co-conspirator's arranging to have an "unnecessary abdominal operation" in order to cause a mistrial.

> The Committee does not intend that the doctrine of *ejusdem generis* be applied to limit the coverage of this subsection. Instead, the analysis should be functional in nature to cover conduct the function of which is to tamper with a witness, victim, or informant in order to frustrate the ends of justice. For example, a person who induces another to remain silent or give misleading information to a Federal law enforcement officer would be guilty under subsection (a)(3), irrespective of whether he employed deception,* intimidation, threat, or force as to the person.
>
> The first branch of the proposed subsection, [§ 1512(a)(3)(A)] referring to the "enforce-

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*** Section 1512 as enacted prohibits misleading a person in order to cause him to alter or withhold testimony or documents. It does not prohibit misleading the tribunal itself.—D.H.G.**

> ment and prosecution of federal law" is designed to carry forward the basic coverage in 18 U.S.C. 1503. The latter two branches of the subsection, [§ 1512(a)(3)(B) and (C)] referring to the "administration of a law under which an official proceeding is being conducted" and to the "exercise of a legislative power of inquiry," are designed to continue the general scope of the final paragraphs of 18 U.S.C. 1505.

Id. at 18-19.

Had the omnibus subsection of § 1512 been enacted as passed by the Senate, the quoted statements and examples would still be of uncertain import for § 1512 (and for §§ 1503 and 1505). On the one hand, with respect to the proposed omnibus clause of § 1512, the Report seems to reject the "*ejusdem generis*" construction that had caused some courts to narrow the reach of the omnibus clause of § 1503, *see, e.g., United States v. Metcalf*, 435 F.2d 754, 757 (9th Cir. 1970), but it does not suggest that those courts had erred or that § 1503 should be amended. On the other hand, the Report interprets the subsection as being limited to activities "the function of which is to tamper"-with someone else. This is important because the proposed omnibus clause did not contain such an express limitation; it merely adopted the "corruptly, by threats or force" formula of §§ 1503 and 1505.

In any event, however, the omnibus clause of § 1512 was not enacted. After the Senate had passed its version, the House debated that bill together with its own victim protection bill. A section-by-section analysis of the House bill indicates that the House Judiciary Committee was also aware that some courts were

interpreting § 1503 narrowly. 128 Cong. Rec. 26,350 (1982). The analysis cites *Metcalf*, 435 F.2d 754 (applying the *ejusdem generis* rule and stating that "the manner in which the statute may be violated would ordinarily seem to be limited to intimidating actions," *id.* at 757), and *United States v. Essex*, 407 F.2d 214 (6th Cir. 1969) (holding that § 1503 is not violated merely by making a false statement, *id.* at 217-18). Nonetheless, neither the bill that passed the House nor the compromise bill that was ultimately enacted criminalizes a witness's violation of his own legal duty (e.g., by lying to the tribunal). (As enacted § 1512 prohibited only using intimidation or physical force against, threatening, or "engag[ing] in misleading conduct toward" another person in order to cause that person to withhold or to alter testimony or documents. Victim and Witness Protection Act of 1982, 96 Stat. 1249 (1982)).

The House passed the Senate bill, as "amended" by substituting the text of the House bill. 128 Cong. Rec. 26,363 (1982). The House and Senate then compromised the differences between their versions, but the resulting statute did not contain an omnibus clause, as had the original Senate version. On the floor, Senator Heinz noted that

> Subsection (3) of section 1512(a) of the Senate passed bill, general obstruction of justice residual clause of the intimidation section, was taken out of the bill as beyond the legitimate scope of this witness protection measure. It also is probably duplicative of abstruction [sic] of justice statutes already on the books.

128 Cong. Rec. 26,810 (1982).

On balance, the legislative history seems to support the transitive interpretation of "corruptly" in § 1505;

not surprisingly, counter-indications as well appear in the course of its evolution from 1831 to the present. One thing is clear, however: the legislative history gives no better notice than does the statutory text that lying to or misleading a Member of the Congress (or an agency) violates § 1505. If anything, the 1940 legislative history suggests that such behavior is excluded from the scope of that section.

B. *Judicial Interpretation of § 1505*

Neither has the statute been sufficiently clarified by prior judicial decisions to give the requisite notice and to protect against "prosecutors, and juries . . . [who] pursue their personal predilections," *Kolender*, 461 U.S. at 358. *Cf. Smith v. United States*, 431 U.S. 291, 308-09 (1977) (obscenity statute not vague in light of prior Supreme Court obscenity precedents). The circuit decisions closest in point hold only that § 1505 does reach certain arguably similar conduct, *viz.* giving "blatantly evasive" answers by "feign-[ing] forgetfulness," *United States v. Alo*, 439 F.2d 751, 754 (2d Cir. 1971), and falsifying or concealing documents, *United States v. Vixie*, 532 F.2d 1277, 1278 (9th Cir. 1976); *see also United States v. Laurins*, 857 F.2d 529, 536-37 (9th Cir. 1988), which postdates Poindexter's alleged conduct.

It is not possible to extrapolate from a case holding that a particular act is within the scope of the statute in order to determine whether a different act is also covered unless the court provides a coherent principle for inclusion or exclusion. The cited cases simply do not contain sufficiently clear—or consistent—reasoning to permit such an extrapolation. Neither *Vixie* nor *Alo* examines either the meaning of the term "corruptly" or the legislative history of § 1505. In-

deed, in *Vixie* there is but one unenlightening sentence rejecting the defendant's argument that "submitting a false document is not a violation of 18 U.S.C. § 1505, where . . . the conduct violates 18 U.S.C. § 1001." 532 F.2d at 1278.

The discussion in *Alo* is more detailed but equally unhelpful. Rather than analyze the meaning of the term "corruptly," the court relies upon the defendant's concession that concealing documents is within § 1505 to infer that giving "evasive" answers must also violate the statute: "[the defendant's theory] would produce the anomalous result that concealing information recorded in one's papers would constitute . . . an offense under § 1505, but concealing data recorded in one's memory would not. No rational basis for differentiating between these types of evidence has been suggested to us, and without a clear statement of contrary Congressional intent we cannot attribute such an arbitrary distinction to the legislature." 439 F.2d at 754. The court did not question the validity of the defendant's concession. Nor did it consider the plausible interpretive principle later suggested by the Third Circuit in *United States v. Walasek*, 527 F.2d 676 (1975), which would indeed bring document alteration but not evasive testimony within the condemnation of the statute. *See* 527 F.2d at 679 & n.14.

Moreover, the *Alo* court itself characterized the statements made by the defendant, *viz.* 134 claims of lapsed memory, as "evasive" rather than false. 439 F.2d at 753-54. "[T]he gist of [the] offense was not the falsehood of his statements, but the deliberate concealment of his knowledge. . . . [The] profession of forgetfulness was not so much false testimony as a refusal to testify at all." *Id.* at 754. *See also id.* at

754 n.4; *United States v. Griffin*, 589 F.2d 200, 203-04 (5th Cir. 1979) (applying § 1503 to evasive statements, while declining to rule upon situation in which defendant's testimony is "merely false"); *id.* at 205 (defendant's testimony "did not merely require the grand jury to ascertain the truth by resolving contradictory evidence; his denial of knowledge had the effect of closing off avenues of inquiry entirely"). Our point is not to sanction the false versus evasive distinction stressed in *Alo*, but to highlight the difficulty of extrapolating from that § 1505 case to Poindexter's alleged conduct.

Nor are cases construing § 1503 instructive in this regard. *See* cases cited in Annotation, *Construction and Application of 18 U.S.C.S. § 1503*, 20 A.L.R. Fed. 731 §§ 17, 18 (1974 and Supp. 1990); cases cited in 18 U.S.C.A. § 1503 (West 1984 & Supp. 1991), notes of decisions 8, 13. A clear interpretation of a similarly worded statute, widely adopted and consistently applied, might shield a facially ambiguous statute from a vagueness attack. That is not the situation here, however. Courts construing § 1503 have adopted a wide variety of interpretations, *see North I*, 910 F.2d at 940-41 & n.14 (Silberman, J., separate opinion) (citing cases). In any event, the language of § 1505 is materially different from that of § 1503, and has been different from the beginning, when § 241(a) was enacted alongside § 241.

Courts that have rejected the *ejusdem generis* interpretation, which limits the reach of § 1503 to conduct influencing another person, have done so because that "reading of the statute renders the omnibus clause superfluous," *United States v. Howard*, 569 F.2d 1331, 1333 (5th Cir. 1978). For example, in *Walasek*, 527 F.2d at 679 N.11, the court stated:

> Appellant's argument is that the last part of § 1503 should be limited to efforts to influence, obstruct or impede the due administration of justice which are directed against individuals. Yet the earlier, specific, prohibitions of § 1503 [influencing witnesses, grand or petit jurors, or officers "in or of" any court] pretty well exhaust such possibilities.

See also Griffin, 589 F.2d at 203. A parallel construction of § 1505 does not create this difficulty. If the concept of acting "corruptly" in the omnibus clause of § 1505 applies only to "efforts to influence, obstruct or impede [the due administration of the law or the due exercise of the power of inquiry] which are directed against individuals," the clause still adds to the coverage of the statute. For § 1505, unlike § 1503, has never expressly prohibited efforts to influence an "officer" whose responsibility it is to "duly administer" the law or "duly exercise" the power of inquiry, such as an agency official or employee, a Member of the Congress or of the congressional staff. The omnibus clause of § 1505 would still serve to criminalize corrupting, threatening, or coercing those persons.

Nevertheless, we need not conclude that the ambiguity of the term "corruptly" in § 1505 renders that term unconstitutionally vague as applied to all conduct. The legislative history we have reviewed may not mandate the "subornation" interpretation of § 1505, which would reach only a person who, for the purpose of influencing an inquiry, influences another person (through bribery or otherwise) to violate a legal duty. Still, that interpretation may be useful as a description of the "core" behavior to which the statute may constitutionally be applied. *See Smith v.*

Goguen, 415 U.S. 566, 578 (1974); *United States v. Harriss*, 347 U.S. 612, 618 (1954) ("If the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise"); *United States v. Maude*, 481 F.2d 1062, 1068-69 (D.C. Cir. 1973). Many interpretations of the statutory language in general, and of the term "corruptly" in particular, have been suggested, but most converge upon such behavior. *See also United States v. Haldeman*, 559 F.2d 31, 115 n.229 (D.C. Cir. 1976) (approving instruction for § 1503 charge in which trial judge stated that "[i]f you find . . . that a Defendant participated in the payment of money to the original Watergate defendants for the purpose of keeping them quiet, you would be justified in finding that a corrupt endeavor to obstruct the due administration of justice occurred").

The core interpretation of § 1505 would be narrower still if, as some have suggested, "corruptly" means that in acting, the defendant aimed to obtain an "improper advantage for [himself] or someone else inconsistent with official duty and rights of others." *See North I*, 910 F.2d at 881-82 (quoting Ballentine's Law Dictionary 276 (3d ed. 1969)); *accord United States v. Reeves*, 752 F.2d 995, 999-1001 (5th Cir. 1985). Then someone who influences another to violate his legal duty has not acted corruptly if his purpose is, for example, to cause the enactment of legislation that would afford no particular benefit to him or anyone connected with him. Or, as the Chief Judge instanced at the oral argument of this case, there "would be some purposes that would be corrupt and some that wouldn't be. . . . [S]uppose the [defendant

acted] to protect the historical reputation of some historical figure that has been dead for 20 years and he decides that he doesn't want to mar that person's reputation."

In any event, we do not now decide whether material advantage to the defendant is a necessary element of the core behavior to which § 1505 may constitutionally be applied. Even if that statute may constitutionally be applied to all attempts to influence or to obstruct a congressional inquiry by influencing another to violate his legal duty, it would still not cover the conduct at issue on this appeal—making false and misleading statements to the Congress.

In sum, neither the legislative history nor the prior judicial interpretation of § 1505 supplies the constitutionally required notice that the statute on its face lacks. Accordingly, we find no reason to disturb our earlier conclusion that the statute is unconstitutionally vague as applied to Poindexter's conduct.

IV. SECTION 1001—COUNTS 4 AND 5

Poindexter also argues that 18 U.S.C. § 1001 does not apply to a false but unsworn and untranscribed oral statement made by an official of the Executive Branch to Members of the Congress acting in their "legislative capacity."

Section 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or

> uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

The language of § 1001 is very broad and, as Poindexter concedes, appears by its terms to cover the conduct charged. Moreover, the Supreme Court has repeatedly held, in a great variety of circumstances, that the proper interpretation of § 1001 is correspondingly broad. *E.g.*, *United States v. Rodgers*, 466 U.S. 475 (1984); *United States v. Bramblett*, 348 U.S. 503 (1955).

This court has previously held that a congressional committee is a "department" for purposes of § 1001. *See United States v. Hansen*, 772 F.2d 940, 943-44 (D.C. Cir. 1985) (forms submitted by congressman to House Committee as required by Ethics in Government Act involve "matter within the jurisdiction of [a] department [etc.]"). Poindexter, however, distinguishes *Hansen* as involving only a "housekeeping" rather than a "legislative" function of the Congress. In support of this distinction, he points out that many courts have recognized an analogous "judicial function" exception, making § 1001 inapplicable to conduct occurring before a court acting in its judicial capacity.

The judicial function exception traces to a dictum in *Morgan v. United States*, 309 F.2d 234 (D.C. Cir. 1962), the holding of which is that § 1001 does apply to one who practiced law by "falsely [holding] himself out to be" another person and member of the bar. *Id.* at 235, 237. We relied upon Supreme Court precedent to conclude that a court could be a "department"

for purposes of § 1001, but also cautioned that the Congress did not intend that the statute apply to "traditional trial tactics." *Id.* at 237 (citing *Bramblett*, 348 U.S. at 509). We viewed the acts charged, however, as involving the court's "administrative" or "housekeeping" functions, rather than the " 'judicial' machinery of the court." *Id.*

A number of courts, relying upon the *Morgan* dictum, have actually held that there is a "judicial function" exception to § 1001. *United States v. Mayer*, 775 F.2d 1387, 1388-92 (9th Cir. 1985) (§ 1001 does not cover submission of fictitious letter of recommendation to sentencing court); *United States v. Abrahams*, 604 F.2d 386, 392-93 (5th Cir. 1979) (answering magistrate falsely regarding aliases and arrest record at bail hearing not covered by § 1001); *United States v. Erhardt*, 381 F.2d 173, 175 (6th Cir. 1967) (submission of falsified receipt into evidence not a violation of § 1001); *see also United States v. Holmes*, 840 F.2d 246, 248-49 (4th Cir. 1988) (recognizing in a dictum judicial function exception, but holding that receiving from defendant false name and consent form to proceed thereunder is within court's administrative function); *United States v. Rowland*, 789 F.2d 1169, 1172 (5th Cir. 1986) (submission of forged bond within administrative function of bankruptcy court and thus subject to § 1001 prosecution).

Poindexter maintains that the rationale for the judicial function exception equally supports an exception for the legislative function. First, he argues that the Congress, like a court, has other ways in which to protect itself against false statements; for example, it can force a person to testify under oath, thus subjecting him to the risk of prosecution for perjury if he lies. Second, he contends that applica-

tion of § 1001 to the legislative context would chill "private discussion between representatives of the political branches." The latter problem is exacerbated, he argues, when § 1001 is applied to an untranscribed statement made by a person not under oath.

We are not persuaded to carve out a broad legislative function exception to § 1001. The *Morgan* dictum and apparently the subsequent opinions of other circuits are grounded primarily upon the concern that the statutory terms "conceals or covers up" not be applied to punish "traditional trial tactics":

> Does a defendant cover up . . . a material fact when he pleads not guilty? Does an attorney cover up when he moves to exclude hearsay testimony he knows to be true, or when he makes a summation on behalf of a client he knows to be guilty?

Morgan, 309 F.2d at 237 (internal quotation marks omitted). *See Mayer*, 775 F.2d at 1389 ("In reading *Morgan*, we sense a concern that applying section 1001 to positions taken before a court during litigation could inhibit vigorous advocacy of parties' interests, particularly those of a defendant in a criminal case."); *United States v. Plascencia-Orozco*, 768 F.2d 1074, 1076 (9th Cir. 1985) ("No trial strategy would justify the misrepresentation of the identity of the defendant" to the magistrate); *Holmes*, 840 F.2d at 248 n.3; *Abrahams*, 604 F.2d at 392-93; *Erhardt*, 381 F.2d at 175; *cf. Bronston v. United States*, 409 U.S. 352, 357-60 (1973) (federal perjury statute does not reach an answer that is "literally true" even if witness intends to mislead).

Although some of the other courts of appeals have since expanded upon the *Morgan* dictum, *e.g.*, *Mayer*, 775 F.2d 1378, we have not, and we doubt that the "traditional trial tactics" rationale of that case shields from criminal responsibility a defendant who knowingly makes a material false statement of fact in a judicial proceeding. We see no reason, therefore, to extend the putative "judicial function" exception to protect one who knowingly makes a material false statement of fact in the course of a legislative inquiry. *See Mayer*, 775 F.2d at 1392 (Fairchild, concurring) ("virtually none of the significant decisions has really defined the [judicial function] exception [or] expounded a rationale," and there is no "compelling reason for extending the exception beyond the exact holdings" of prior cases).

Poindexter also argues that 1001 should apply to "private discussions between representatives of the political branches where, as here, no oath is administred and no verbatim transcript is maintained." In such circumstances, "proof literally becomes a matter of one person's word against another, even though neither may have heard or remembered with precision exactly what form of words was used in making an allegedly false statement." We have already held, however, that 1001 may be applied to "statements [that were] not under oath [and were] not stenographically transcribed." *See Marzani v. United States*, 168 F.2d 133, 141 (D.C. Cir.), *aff'd by an equally divided court*, 335 U.S. 895 (1948). The The absence of such formal trappings is relevant, of course, to the difficulty of proving beyond a reasonable doubt exactly what the defendant said and whether he intended to deceive his audience as to a material question of fact; but these are issues of the

sufficiency of the evidence in a particular case, not reasons for carving a categorical exception from the statute.

Nor is our understanding of the statute altered because the false statement is made in a meeting between representatives of the political branches. Section 1001 requires that the statement be made to a government department; that it was here also made by the representative of another government department adds a political dimension to the relationship between speaker and auditor.

Poindexter correctly points out that "[i]nformal powers and protections . . . play a significant role" in the ongoing relationship between the political branches. "[A]n Administration or administrative official who lies to Congress can lose the political and personal trust that is essential to the effective operation of government at its highest levels." But that is hardly a reason for believing that the Congress did not intend that § 1001 also be applied to an Executive Branch representative who bears false witness before it; indeed, the contrary implication is more plausible. *See Hansen*, 772 F.2d 940 (§ 1001 applies to false financial disclosure report filed, pursuant to Ethics in Government Act, with House Committee). *But cf. id.* at 943, n.1 ("One hundred twenty-three members of Congress filed an *amicus* brief arguing that Congress did not intend criminal sanctions to attach to EIGA violations.").

V. Conclusion

Because the IC has failed to show that Poindexter's immunized testimony was not used against him at trial, we reverse the convictions on all counts. The

convictions for violations of § 1505 are also reversed on the ground that the statute cannot constitutionally be applied to some of the conduct alleged in Counts 2 and 3 of the indictment. The case is remanded to the district court for such further proceedings on the indictment as the IC may pursue.

So ordered.

MIKVA, *Chief Judge*, dissenting in part: In *United States v. North*, this Court changed the standards the special prosecutor had to meet; today we refuse to let him try to meet them.

United States v. Kastigar, 406 U.S. 441 (1971), requires trial judges to determine whether testimony in court is tainted by immunized testimony before Congress. For many years, many judges met the burdens of *Kastigar* by reviewing suspect testimony in *ex parte* hearings. In the *North* case, however, we found that the trial judge could meet his burden only after conducting an "open adversary hearing." *See United States v. North*, 910 F.2d 843, 867 ("North I"), *modified* 920 F.2d 940, 944 (D.C. Cir. 1990) ("North II"). The *North* decision also expanded the scope of 18 U.S.C. § 6002 by holding that a prohibited "use" occurs whenever a witness's testimony is in any way "shaped, altered, or affected" by immunized testimony. *See North I*, 910 F.2d at 863. We remanded the *North* cases, accordingly, to let the trial judge consider our new formulation of the *Kastigar* burden by reviewing the testimony "line-by-line and item-by-item." *Id* at 872. The majority now declares that a similar remand would be "pointless" in John Poindexter's case, Maj. Op. at 9-10, even though this court has not given this trial judge a chance to apply the new construction of *Kastigar*.

As a practical matter, of course, the special prosecutor's recent decision to abandon his case against Oliver North suggests that the new burdens are hard to meet. But the decision to prosecute belongs to the prosecutor, and the decision to dismiss belongs to the trial judge, and today this Court usurps their authority by denying them the chance to exercise it.

My quarrel is not with the more rigid approach to *Kastigar* enunciated in the *North* decisions. Indeed, I think it appropriate that Congress should be forced to weigh the potential consequences of using its investigative authority against the imperilment of individual criminal prosecutions. In any event, *North* is the law of this Circuit, if not of the country, and we are bound to apply it.

I quarrel strenuously, however, with the almost casual way in which this court has thrown aside the lengthy and careful attempts by our trial judges to do their job. Respect for the difficulties experienced by a trial judge in trying to determine the applicable law ought cause a reviewing court to shun the result we proclaim today.

The majority refuses to remand because it finds nothing in the record to support a finding that the prosecution met its burden of proof under *Kastigar* and because the prosection failed to identify additional evidence that would satisfy this burden. *See* Maj. Op. at 10. However, this court is not in a position to say that the district court could not conclude, after a full hearing applying the appropriate standard, that the prosecution has satisfied its burden. Indeed, I find that the trial court could very well conclude, on remand, that the special prosecutor has met his burden under *North's* reading of *Kastigar*.

Under *Kastigar*, the prosecution must show that it has a legitimate source of evidence "wholly independent" of any compelled testimony. *See Kastigar*, 406 U.S. at 460. Furthermore, *North* requires that the prosecution demonstrate that any offered testimony is not "shaped, altered, or affected," in any way by immunized testimony. *See North I*, 910 F.2d

at 863. I find that North's testimony under oath at his own trial clearly would meet this rigid standard. North's testimony related to events he lived through and of which he had personal knowledge without any reference to Poindexter's testimony. Some of his testimony simply tracked what he told Congress *before* Poindexter testified.

The majority disagrees, concluding that, in light of North's exposure to Poindexter's immunized testimony and his statement that he could not segregate the effects of that exposure, it would be "clearly erroneous" for a trial judge to hold that the independent counsel has met its burden of showing that immunized testimony did not influence North. Maj. Op. at 12. In support of this conclusion, the majority points to this court's statement in *North II* that a "grave problem" for the prosecutor arises when a witness testifies that he is "unable to determine just how much exposure affected [his] testimony." *See* Maj. op. at 12 (citing *North II*, 920 F.2d at 944). But this statement necessarily assumes that the trial judge *believes* the witness when he says he cannot segregate the effects of the immunized testimony—and the trial judge here did *not* believe Colonel North.

At his own trial, North was required to testify, under oath, subject to penalty for perjury, about what he knew personally, not about what someone told him he knew. I find it strange that he now claims he cannot separate what he knows through his memory and experiences from what he heard Poindexter say. More importantly, the district court rejected Colonel North's statement as "totally incredible." *See* Memorandum *re* Testimony of Oliver North, Mar. 8, 1990, at 10. I would defer to the trial judge's finding regarding Colonel North's credibility.

As the majority points out, there is no way for a trier of fact (or anyone else for that matter) to infiltrate the mind of a witness and determine whether his memory would be substantially different if he had not been exposed to immunized testimony. *See* Maj. Op. at 12-13 (quoting *North I*, 910 F.2d at 860-61). But this court concluded in *North I*, that it still may be possible for the trial court to "separate the wheat of [North's] unspoiled memory from the chaff of [Poindexter's] immunized testimony . . . ." *See North I*, 910 F.2d at 862. More importantly, this determination should be made by the trier of fact after a full *Kastigar* hearing, not by this court on appeal. *See North I*, 910 F.2d at 867 ("an ex parte review in appellate chambers is *not* the equivalent of the open adversary hearing contemplated by *Kastigar*"). The respect that the *North* court gave to the authority of the prosecutor and the trial judge makes our decision to usurp their authority today all the more puzzling. Because the trial court never had a chance to apply this court's new *Kastigar* standards properly, we should remand this issue to give him the chance to determine whether the prosecution can meet them.

The majority contends that, even ignoring North's statements about his testimony, the prosecution has still failed to meet its burden of demonstrating that Poindexter's immunized testimony did not influence witnesses. *See* Maj. Op. at 13. But once again, the prosecution has never had an opportunity to try to meet its new burden.

Obviously, a ruling by the district court discounting North's statements regarding taint would merely put the prosecution back to square one, still facing,

without the benefit of canned statements, the "extremely difficult" task of proving that immunized testimony was not used against Poindexter. *See North II*, 920 F.2d at 943. But this court held in *North II* that while canned testimony is *one* recognized method of satisfying the prosecution's burden, this does not "even mean to suggest that the prosector [is] barred from trying to show in *any* fashion that a witness' testimony was not influenced by the immunized testimony." *See id.* at 943 (emphasis added). The fact that the independent counsel has a difficult burden to meet does not mean that we must deprive him of the opportunity to try.

The holding that the majority announces today proclaims a very troubling guideline: "where a substantially exposed witness does not persuasively claim that he can segregate the effects of his exposure, the prosecution does not meet its burden merely by pointing to other statements of the same witness that were not themselves shown to be untainted." *See* Maj. Op. at 13. Under this standard, apparently, as soon as a witness claims to have trouble remembering what he knew before he was exposed to immunized testimony, all of his own testimony is presumptively tainted unless the prosecution can show that it is not. The Court today tells future defendants that all they need to evade responsibility is a well timed case of amnesia.

There is another issue in the majority opinion that gives me great pause. The majority reads the word "corruptly" as it applies to Poindexter's behavior alleged in Count III of the indictment in a very peculiar way. Count III alleged that Poindexter corruptly obstructed congressional investigations into arms sales to Iran by preparing a false chronology indicating

that U.S. officials did not know of the November 1985 missile transfers until January 1986; by stating in meetings with the House and Senate Intelligence Committees that he did not learn of the November 1985 missile deal until January 1986; by telling the House Intelligence Committee that he did not learn until November 20, 1986 (the day before the meeting) that any U.S. official had prior knowledge of the 1985 transfer; and by deleting certain messages sent or received by him from an NSC computer system. Count III claimed that Poindexter's action violated 18 U.S.C. § 1505 which establishes criminal penalties for anyone who obstructs agency investigations or who "corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes . . . [a congressional investigation]." 18 U.S.C. § 1505 (emphasis added).

It seems obvious to me that Poindexter "corruptly" obstructed the congressional investigation when he lied to Congress. But after consulting the Oxford English Dictionary, the majority has decided that the statute does not mean what it says, and instead is unconstitutionally vague. Invoking a confusing distinction between what it calls the "transitive" and the "intransitive" meanings of the word "corruptly," the majority concludes, in effect, that Congress intended to punish those who obstruct justice by inducing others to lie under oath, but did not intend to punish those who obstruct justice by lying on their own initiative. This strikes me as odd. As we recognized in *North I*, "[i]n general, common words in statutes should be given their common or popular meanings, in the absence of congressional definition." 910 F.2d at 881.

Instead of taking the words of the statute at their face value, the majority strains to adopt a transitive definition of "corruptly" as acts that influence others to violate a legal duty. The plain language of the statute just as easily supports an intransitive definition of "corruptly" as acts that violate one's own legal duty. This reading is not unconstitutionally vague, and nothing in the legislative history is inconsistent with it. As the majority points out, either a transitive or an intransitive reading of section 1505 would be unconstitutionally vague unless the word "corruptly" is given a more specific meaning. *See* Maj. Op. at 19. By requiring an allegation that the conduct is in violation of a legal duty, the majority suggests that the vagueness in the term would be removed. *See* Maj. op. at 19. But while "corruptly" cannot be read to criminalize all attempts to infiuence Congress, there is a clear distinction between politically misleading (but literally true) advocacy and outright lying. No matter how devious the intent, a mere act of lobbying or otherwise seeking to persuade an official cannot fall under the definition of "corruptly" in the context of section 1505, since advocacy is not "inconsistent with a legal duty." As we recognized in *North*, executive personnel "constantly attempt, in innumerable ways, to obstruct or impede congressional committees" as part of "legitimate political jousting between the executive and legislative branches." *See North I*, 910 F.2d at 882.

But the conduct alleged in Count III was not "political jousting." Poindexter *lied* to Congress about the existence of the first Presidential finding and then later destroyed it. This was a clear violation of his oath of office, his oath to Congress, and his duty not to lie. Count II does sound very much like the political positioning that would stretch the statutory

terms beyond constitutional limits, and I concur in the judgment as to that count. But the conduct described in Count III is of a different stripe altogether. The allegations in Count III fall within the plain meaning of the term "corruptly," and I would uphold Poindexter's conviction on that count.

Looking at the words of the statute, I see no reason to narrow them to their transitive meaning. A person can violate section 1505 by corruptly (i.e. acting in a manner inconsistent with a legal duty) obstructing, influencing, or impeding a congressional inquiry, a person can violate the statute by using threats in a manner that obstructs, influences, or impedes a congressional inquiry; and a person can violate the statute by using force to obstruct, influence, or impede a congressional inquiry. None of these uses is inconsistent with the statute and none involves a defendant influencing *another* person to violate his legal duty in a manner that obstructs a congressional inquiry. The majority concludes that the statute favors only a transitive reading because the other terms, "by threats," "by force" and "by threatening letter or communication," are all transitive and take as their object a natural person. *See* Maj. Op. at 19. I cannot imagine, however, that Congress meant to prohibit attempts to obstruct justice by influencing someone else to violate a legal duty, but did not mean to prohibit attempts to obstruct justice by violating one's own legal duty.

Since I believe that section 1505 is clear on its face, there is no need to look to any legislative history. I note, however, that nothing in the legislative history is inconsistent with using the intransitive definition of "corruptly" given by this court in *North I:* acting with "the intent to obtain an improper ad-

vantage for [one]self or someone else, inconsistent with official duty and the rights of others." *See North I*, 910 F.2d at 881-82.

The 1940 predecessor to section 1505 contained two clauses: clause [1] addressed efforts to "corruptly . . . influence, intimidate, or impede any witness in any proceeding pending before . . . Congress;" clause [2] addressed efforts to "corruptly . . . influence, obstruct, or impede [a] the due and proper administration of the law . . . or [b] the due and proper exercise of the power of inquiry [in a proceeding before Congress]." *See* Act of January 13, 1940, ch. 1, § 135(a), 54 Stat. 13 (1940). In light of the first clause, which criminalized attempts to induce a witness to violate his legal duty, the second clause, which contains the wording now in section 1505, would be superfluous if it was construed as the majority would construe it. Furthermore, it is absurd to point, as the majority does, to Senator O'Mahoney's statement that the bill did not intend to restrict the rights of witnesses appearing before Congress, *see* Maj. op. at 23 (citing 84 Cong. Rec. at 10526 (1939)), as evidence that the bill did not intend to criminalize a witness's violation of his legal duty. A witness has never had the right to violate his legal duty—especially his duty not to lie.

Today the witness protection provisions in the first clause of the 1940 statute are found in section 1512 along with the witness protection provisions that existed in an earlier version of section 1505. *See* 18 U.S.C. § 1512. Again, nothing in the history behind section 1512 directly addresses the meaning of the term "corruptly" in section 1505. As the majority notes, section 1512 does not criminalize attempts by the witness to mislead Congress himself, *see* Maj. op.

at 26; it seems clear to me that the term "corruptly" in Section 1505 does.

Recent decisions of this court have made the special prosecutor's path a most difficult one. *In re Sealed Case*, 838 F.2d 476 (D.C. Cir. 1988) told him that he was unconstitutional. After the Supreme Court reassured him that he was not, *Morrison v. Olson*, 487 U.S. 654 (1988), he was roadblocked by the new variations on *Kastigar* set forth in this court's *North* decisions. Today this court unfairly decides that even though the proper *Kastigar* standards were not enunciated until after the trial in this case, the special prosecutor will not get a chance to apply them. I dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 88-0080-01
(HHG)

UNITED STATES OF AMERICA

v.

JOHN M. POINDEXTER

OPINION

[Filed May 29, 1990]

Following his conviction by a jury on all five counts of the indictment, defendant has filed a motion for judgment of acquittal as well as a motion for a new trial. Opposition memoranda by the government and a reply brief by the defendant have also been filed.

I

The Evidence

The Court will first consider the motion for a judgment of acquittal. Rule 29, Fed. R. Crim. P. In addition to relying generally on the grounds asserted at the close of the government's case, the current papers raise a number of specific points. While the motion is predicated upon the proposition that the govern-

ment has failed to prove the offenses charged in the indictment, neither it nor the memoranda discuss the evidence as a whole; rather, they select with respect to each count one or two elements as being defective or not fully proved (*see, e.g.*, pp. 15-16, *infra*), and they raise a number of other discrete issues.

Before discussing the matters explicitly advanced in these motions, the Court deems it helpful for an understanding of the issues to summarize the evidence adduced at the trial. This is appropriate not only to provide the necessary context but also because on many of the questions at issue the particular subjects were never raised by appropriate objection during the trial,[1] and defendant can therefore now prevail with respect to them only if he demonstrates substantial prejudice. The level of evidence of guilt has of course a significant bearing on the question of prejudice. A summary of the evidence, analyzed in accordance with the *Weisz* standard (*see* p. 9, *infra*), is accordingly provided in the note below.[2]

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[1] The failure of defendant's conscientious and alert counsel to object may be some indication of the lack of substance of the alleged errors.

[2] The evidence shows that as early as the fall of 1984, Lt. Col. Oliver North, a member of the staff of the National Security Council (NSC), was involved in providing military assistance to the Contras (the forces resisting the Sandinista government of Nicaragua) at the direction of then National Security Advisor Robert McFarlane and his deputy, Admiral John Poindexter. When Congress inquired into reports of North's Contra-related activities in August 1985, McFarlane provided the congressional committees with false information to the effect that neither North nor anyone else on the NSC staff was furnishing military advice or assistance to the

A review of this evidence reveals that proof of defendant's guilt of the charges is compelling; it consists not only of testimony that was not substantially shaken on cross-examination but also of many cor-

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Contra resistance groups. Poindexter knew that this information was false for he had been apprised of North's activities since the inception of the project.

When in the summer of 1986 the subject of the NSC's involvement in assisting the Contras militarily arose again, three House committees asked the President to comment on the need for a resolution of inquiry into the NSC's activities in this regard. Poindexter, who had in the meantime become the National Security Advisor, replied by referring the committees to the earlier, false McFarlane responses. Poindexter also arranged to have North meet with committee members with the understanding that he would provide false information concerning the Contra-support activities; North complied; and Poindexter congratulated him on a job well done.

While these activities were taking place with respect to Nicaragua, the United States, in November 1985, shipped a number of Hawk missiles to Iran through the Central Intelligence Agency. Poindexter and other high officials were aware of the shipment as it occurred. The shipment was authorized by a Presidential Finding, which was signed by President Reagan in late November or early December 1985, in accordance with section 662 of the Foreign Assistance Act of 1961. The Finding included language indicating that the missiles were being sold to the Iranian government in order to obtain the release of American hostages—language that contradicted the President's stated policies against making concessions to hostage-takers. Subsequent missile shipments were sold to Iran at a price in excess of that which was being charged by the Department of Defense, and the extra profit was used largely to finance the Poindexter-North Contra activities. Although the Contra support project and the Iranian initiative were linked from the inception of the latter through the use of General Richard Secord and the companies established by North, Secord, and other conspirators, this diversion of

roborating documents whose authenticity and significance are beyond serious dispute. By contrast, the defense mounted against the charges was neither broad nor particularly convincing, consisting in the

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funds solidified the link between the two operations and ensured that exposure of one would lead in short order of the discovery of the other.

When reports about the Iranian arms shipments began to circulate the first week of November 1986, congressional committees demanded meetings with Poindexter to have him explain the situation. Prior to the meetings, which were scheduled for November 21, 1986, defendant became involved in the generation of a chronology of events which deliberately and falsely omitted the fact that United States officials had known prior to January 1986 that the Hawk missiles had been sent to Iran. The false information contained in this chronology was subsequently endorsed in a conference of high-level officials hosted by Poindexter on November 20, 1986. Poindexter met the next day, as scheduled, with the House Permanent Select Committee on Intelligence (HPSCI or House intelligence committee), and then with the Senate Committee on Intelligence (Senate intelligence committee), and gave testimony that paralleled the chronology.

After the meetings on November 21, 1986, Poindexter learned that Attorney General Edwin Meese had made a decision to begin a factual inquiry into the entire matter. Also that day, Poindexter authorized North to check out of a secure, restricted safe documents evidencing illegal Contra support; North obtained the documents; and he promptly altered them by eliminating compromising material. Thereafter, some time between November 21 and November 24, 1986, Poindexter destroyed the 1985 Presidential Finding (with its embarrassing arms-for-hostages language), and eliminated some 5,000 PROF notes from his computer system. Meanwhile, North destroyed or altered substantial numbers of other incriminating documents, and his secretary Fawn Hall smuggled a number of documents out of the White House in her clothing. On November 25, 1986, when many of the Iran-Contra events were becoming publicly known, the

main only of attempts to suggest that others, in particular defendant's predecessor in office Robert McFarlane, his subordinate Oliver North, and his superior President Ronald Reagan bore some of the responsibility for activities with which defendant had been charged,[3] and that defendant lacked the requisite intent to commit the offenses. This relative weakness of the defense appears to have been due to the fact that neither the former President nor Oliver North were willing to relieve defendant of culpability,[4] and that, other than to attempt to weaken the testimony of the government's witnesses through cross-examination, Poindexter simply did not have a defense of his own.

President dismissed North and accepted Poindexter's resignation.

Although not presented to the jury, it is worth noting the dates of other events related to this prosecution. On December 19, 1986, Lawrence Walsh was appointed as Independent Counsel pursuant to the Ethics in Government Act, 28 U.S.C. § 593(b), to investigate the arms sales to Iran and the provision of military aid to the Contras, and a grand jury was empanelled in this District on January 28, 1987. In the summer of 1987, select House and Senate committees conducted a joint investigation into these events, now known as the Iran-Contra affair, and Poindexter, North, and others were required to testify pursuant to a grant of use immunity. On March 16, 1988, the grand jury returned an indictment against Poindexter, North, Secord, and Albert Hakim, and on March 5, 1990, following severance of the defendants and the trial of North, the charges against Poindexter went to trial in this Court.

[3] Defendant did not claim, however, that any of the activities engaged in by these persons were necessarily illegal.

[4] McFarlane and Richard Secord, both of whom had pleaded guilty, were not called as witnesses by either side.

Since a substantial part of the trial evidence, both the government's and defendant's, revolved around the activities of a small number of other individuals, the issue of defendant's role in the context of the overall scheme and hence his culpability can most readily be understood by a side-by-side examination of that role with the roles of these others.

Notwithstanding defense suggestions through counsels' questioning of witnesses and otherwise, there is no evidence in this record to support the proposition that former President Ronald Reagan ordered or authorized the conspiracy, the obstruction, the false statements, or the violation of the Boland Amendment prohibitions themselves. The former President so testified credibly and under oath, and no testimony was adduced from any witness contradicting him either directly or indirectly. Thus, at least for purposes of the current proceedings—if not more broadly —that may be taken as a fact.[5]

It does appear that President Reagan impressed upon his subordinates and others his deep concern both about the survival of the Contras in Central America and the fate of the hostages held by or on behalf of Iran, and to that extent he may have helped to generate an atmosphere at the White House which led subordinate officials to conclude that they were carrying out the President's wishes when they transgressed the Boland restrictions and otherwise violated the law. However, there is likewise no evidence to

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[5] Conceivably new facts could emerge in the future, but as far as the evidence from this trial is concerned—consisting of the testimony of two of the principal figures, President Reagan and Oliver North, and substantial evidence about the third, John Poindexter—there is no proof to the contrary.

contradict the former President's testimony that he warned his subordinates against acting outside the law.[6]

It is also true that Oliver North, in particular, as well as some others,[7] were engaged in far-flung operations apparently in contravention of American policy restrictions even before Admiral Poindexter assumed control of the National Security Council staff in December 1985, and this surely exerted some pressure on everyone, including Poindexter, to continue these activities and to augment their scale and scope.[8]

As concerns North, there was testimony that he was regarded as having a tendency to exaggerate his own role in operations and to be less than fully scrupulous with the truth. Furthermore, given his relatively low rank, and notwithstanding his often imaginative and courageous actions, it is improbable that he could have overseen and implemented the sensitive and far-flung operations that ultimately became the subject of the indictment and the evidence here. A more senior figure, more trusted in the White House as well as elsewhere in government, was needed to direct and make decisions for the conspiracy. That role, the evidence shows, was assumed by the National Security Adviser, Admiral John Poindexter.

The precise dimensions of defendant's actions with respect to each particular count of the indictment and

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[6] In any event, these high military and civilian officials with substantial experience must have known, with or without the President's admonitions, that they had no warrant or authority to violate the law of the land.

[7] *E.g.*, Robert McFarlane and Richard Secord.

[8] The Iran-Contra activities reached their greatest magnitude while Poindexter was National Security Advisor.

the various technical and other specific disputed points are discussed below. However, considering the evidence for the moment only from a broad and overall point of view, there can be no question but that it supports the jury's verdict: defendant was an integral and important part of the unlawful activities known as Iran-Contra.

II

Specific Counts

On a motion for a judgment of acquittal, the defendant can prevail only if he is able to demonstrate that, "viewing the evidence most favorably to the government and according the government the benefit of all legitimate inferences therefrom, a reasonable juror *must necessarily* have had a reasonable doubt as to the defendant's guilt . . . A judgment of acquittal is appropriate only when there is no evidence upon which a reasonable juror might fairly conclude guilt beyond a reasonable doubt". *United States* v. *Weisz*, 718 F.2d 413, 437-38 (D.C. Cir. 1983) (citations omitted; emphasis in original); *see also*, *United States* v. *Laing*, 889 F.2d 281, 289 (D.C. Cir. 1989); *United States* v. *Gates*, 807 F.2d 1075, 1081 (D.C. Cir. 1986). It is through the lens of that standard that the issues and the evidence must be viewed.

A. *Count One: Single Conspiracy*

Defendant's sole point with respect to Count One of the indictment, the conspiracy count, is that the government failed to prove the existence of a single conspiracy, as distinguished from multiple conspiracies. This flaw, it is said, requires a judgment of acquittal on that count.

The Court ruled at the very outset, in disposing of defendant's pretrial motions, that the indictment charges a single conspiracy "to defeat congressional inquiries into the defendants' Iran-contra activities by a variety of means, as necessary to conceal the conspirators' activities . . . ." *United States* v. *Poindexter*, 725 F. Supp. 13, 18 (D.D.C. 1989). Citing *Braverman* v. *United States*, 317 U.S. 49, 53-54 (1942), the Court noted that, whether the object of a single agreement is to commit one crime or many, it is in either case the agreement that constitutes the conspiracy. And the Court pointed out that "a single conspiracy count which includes allegations of several objects, several means, and several overt acts is more typical of criminal litigation in the federal courts . . . . than the segmented charges defendant claims to be the only ones warranted by law." 725 F. Supp. at 19. Nothing has occurred in the course of the trial to alter that assessment.

The indictment here alleges and the evidence established a single agreement, and under many decisions, of which *Braverman*, *supra*, is typical, that alone suffices for the conclusion that there was but a single conspiracy. However, even if one were to proceed beyond that, it would not comfort the defendant. In *United States* v. *Tarantino*, 846 F.2d 1384, 1393 (D.C. Cir. 1988), the Court of Appeals established a multi-factor standard for determining whether the evidence in a particular case establishes a single or several conspiracies, the most important of which are the existence of a common goal, the degree of interdependence of the various activities, and the degree of overlap between the participants in the events.

Under each of these tests, and all of them, there was in this case but a single conspiracy.

The conspirators here plainly shared a common objective—the concealment of the Iran-Contra activities from congressional knowledge. The various activities were also heavily dependent upon each other since the discovery of one was likely to lead to an unravelling of the other. Indeed, that is what ultimately occurred: discovery of the Iran initiative led almost instantaneously to broad public and congressional knowledge of the participants' Contra supply efforts. Finally, there was almost total overlap of personnel: the major figures—Oliver North, Richard Secord, Robert McFarlane, and John Poindexter—were all deeply implicated in both parts of the conspiratorial effort.

Defendant advances two principal arguments in response to these massive indicia of a single conspiracy.[9]

First, it is said that no single agreement could have had the objectives of obstructing both the con-

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[9] Defendant also asserts that the Court should have instructed the jury that it could find the existence of several conspiracies. As discussed above, the grand jury charged and the evidence established, a single, ongoing conspiracy to conceal the Iran-Contra activities from Congress through the use of illegal means. That being so, defendant was not entitled to a multiple conspiracy instruction, for the rule is that, if the evidence, viewed in the light most favorably to the government, establishes a single conspiracy, a multiple conspiracy instruction is not warranted. *United States* v. *Towers*, 775 F.2d 184, 189 (7th Cir. 1985); *see also, United States* v. *Ras*, 713 F.2d 311, 315 (7th Cir. 1985); *United States* v. *Martino*, 664 F.2d 860, 875 (2d Cir. 1981); *United States* v. *Anderson*, 532 F.2d 1218, 1230 (9th Cir. 1976).

gressional inquiry in July-August 1986 and the congressional inquiries of November of that year. These inquiries took place at different times, so the argument goes, and defendant could not have entered the conspiratorial agreement with knowledge of the "then-pending" November congressional inquiry because that inquiry was not yet pending when defendant allegedly entered the conspiracy. Def. Mem. at 2-3. This argument was presented to the Court in a motion to dismiss Count One over eight months ago, and its merits have not improved with time. As the Court said then, "there is no reason why a single conspiracy could not have as its object the obstruction of several legislative inquiries not overlapping as to time, into the same or of related subjects." 725 F. Supp. at 18 n.3.[10]

It is in any event clear that a criminal agreement could cover the intended obstruction of inquiries whenever they might occur, even if some of these inquiries were not yet in being at the time the agreement was entered into. A conspiracy to sell drugs, to evade the police, to furnish inside financial information when the opportunity presents itself—none of these requires proof of the establishment of a new and separate conspiracy whenever the anticipated

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[10] The only new authority cited in support of this contention—*United States* v. *Gordon*, 844 F.2d 1397, 1401 (9th Cir. 1988)—is entirely distinguishable. The indictment there charged defendants with a conspiracy with two different objectives: defrauding the government in connection with a missile program, and obstructing a subsequent grand jury investigation. The indictment in this case, by contrast, charged a conspiracy that had, from its inception, only the one goal of deceiving Congress through a variety of means.

events occur. An agreement to do what is necessary when the time comes will do nicely.

As for defendant's second contention—that the government failed to prove a factual nexus between concealment of the Contra-support activities and that of the Hawk missile shipment to Iran—is equally devoid of merit. The evidence showed that there was such a nexus and that it consisted of many strands.

There was, for example, the diversion to the supply of the Contras of some of the profits from the arms sales to Iran and the consequent need to keep secret both aspects of the Iran-contra effort, lest knowledge by Congress of one would result in the unravelling of the other; there was North's clandestine use of General Secord, his associate from the Contra supply operation, for the missile shipment to Iran;[11] and there were the PROF notes [12] of November 22, 1985, and December 4, 1985, which caution in a variety of ways that the November missile shipment to Iran might interfere with or complicate the conspirators' operations with respect to the Contra supply network. *See* Exh. 37, 41.

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[11] North described Secord's prospective involvement in the Hawk missile shipment to Poindexter in memorandum dated November 21 and 22, 1985. *See* Government Exhibits (hereinafter "Exh.") 36, 37.

[12] PROF notes are a form of electronic mail used as a means of communication between and among the personnel of the National Security Council staff, essentially taking the place of memoranda or letters. Within this system, defendant established a separate channel through which he and North could communicate directly and secretly regarding both the Contra project and the Iran initiative. The PROF notes using this private channel discussed both projects as well as their interrelationship as early as November 1985.

B. *Count Two: Knowing Commission of Acts of Obstruction*

Not much needs to be said regarding defendant's argument for an acquittal on Count Two, one of the two counts charging obstruction of Congress. His sole point regarding that count is that the government failed to prove that he acted "with the state of mind required for conviction under 18 U.S.C. § 1505," that is, that he "knowingly" committed or endeavored to commit one or more of the acts of obstruction, and that he did so with the improper purpose of obstructing the relevant inquiry. Def. Mem. at 5. Since the Court instructed the jury in just those terms, defendant would have to demonstrate, in order to prevail, that the jury could not have found any evidence in the record on the issue to support its guilty verdict on that count. However, there were several factual bases for that verdict, any one of which would be sufficient to support it.

First, the evidence showed that defendant obstructed Congress by sending false and misleading letters to three congressional committees on July 21, 1986, incorporating in these letters the 1985 false response provided to Congress in 1985 by McFarlane. There can be no question but that defendant did incorporate the McFarlane response into his own July 1986 letters—the letters say so [13]—and the only con-

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[13] In addition to the language of the letters, there was testimony by Ronald Sable who stated that defendant instructed him that, in drafting the letters, he was "essentially [to] follow the line that had been used in Bud McFarlane's response to the Congress about similar activities." Tr. at 1902. Defendant even went so far as to insist that, before interviewing North, the members of the House Intelligence Com-

ceivable defense could therefore be that defendant did not know what information McFarlane had furnished the committee and that this information was false. However, the evidence also showed that defendant was well acquainted with the 1985 inquiries (Exh. 163); that he had been furnished with a draft copy of the McFarlane response (Exh. 25 and 26); and that he had broad and detailed knowledge of North's Contra-support activities which the McFarlane response had denied.[14]

A second basis for the guilty verdict on Count Two was evidence demonstrating that the defendant caused Oliver North to make false statements to the House of Representatives Intelligence Committee on August 6, 1986.[15] In the current motion, defendant does not contest that he arranged for North to appear before the committee; to lie to it; that North did just that; and that upon learning that North had in fact deceived the committee with his false statements, defendant sent him the message, "Well Done." The only point defendant makes is that there was no proof that he had knowledge of the inquiry pending pursuant to House Resolution 485 when he caused North to make the false statements. In fact, the evidence showed that defendant knew that the Resolution was alive as he was setting up the North briefing (Exh. 84), that it was alive during the North briefing

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mittee re-read the McFarlane letters. Tr. at 1904-05, Exh. 84 and 85.

[14] *E.g.*, testimony in Tr. at 971, 983-86, 1557-60, and Exhibits 2, 3, 4, 37, 54, 66, 70, 143A, 145A-B.

[15] As a third and further alternative, the jury could have found that defendant was an aider and abettor to the criminal acts of others, *e.g.*, North.

(Exh. 89), and that it was alive after the North briefing (Exh. 104).[16]

In short, there is no merit to defendant's attack on the validity of the conviction of Count Two.

C. *Count Three: Evidence of Obstruction*

The jury instructions on Count Three—which defendant does not challenge—informed the jury that it could convict defendant[17] of obstruction of Congress on the basis of either his participation in the preparation of a false chronology of events, or the deletion of his PROF messages from the computer system.[18]

First. With respect to the false chronology, defendant argues that the evidence does not show that he intended that document to be used for the unlawful purpose of obstructing Congress. Def. Mem. at 9. But the evidence demonstrates precisely that. There was proof that (1) by November 10, 1986 defendant knew that he and CIA Director William Casey would be required to brief the House committee on the Iran Initiative (Tr. at 2716-80, 1915-19, Exh. 119); (2) at

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[16] Defendant's claim that he could not have had knowledge of the pending inquiry because Congressman Lee Hamilton advised him that H. Res. 485 was not a particular concern of his, Reply Mem. at 4-5, is not only obscure but also irrelevant.

[17] As in Count Two, the jury was also instructed that it could find defendant guilty of Count Three as an aider and abettor.

[18] A third alternative—defendant's November 21, 1986 statements regarding the time when he and others learned about the shipment of Hawk missiles to Iran—is dealt with by the parties and hence by the Court under the rubric of Counts Four and Five.

about the same time, defendant directed North—who knew that some of the events would not be accurately reported—to begin preparation of a chronology of that Initiative (Tr. at 1184); (3) defendant had in his possession both early true versions of the events and later false versions (Tr. at 1184, 1198-99); (4) a meeting of the principals was held in defendant's office at which the false information used in the chronology were discussed in detail (Tr. at 1199-1206, 1460); and (5) on November 21, 1986, defendant briefed the House and Senate intelligence committees in which he provided the false information consistent with the chronology (Tr. at 2188, 2190-93, 2385-89). On the basis of this evidence, the jury was plainly justified in concluding that defendant was involved in the preparation of the false chronology, and that the chronology was part of an obstruction of the congressional inquiry to learn the truth about the Iran initiative.[19]

Second. There also was ample evidence to support the conclusion that, when defendant completely eliminated thousands of PROF notes from his computer system, it was done with a purpose to obstruct the congressional inquiry. The deletion of these notes of

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[19] Defendant contends that, notwithstanding the enormous effort by many high officials that went into the preparation of a false chronology to be furnished to the Congress, the jury could not rationally find that it was the purpose of this chronology to obstruct Congress, especially because in his personal appearance before the congressional committee defendant threw out hints about prior United States knowledge of the Hawk missile shipment. Def. Mem. at 8-9; Reply Mem. at 5. All that this argument proves is that there was some evidence from which a jury *could* have concluded lack of intent. But this weak evidence certainly did not require the jury so to find.

high relevance to defendant's role in Iran-Contra, at the very time that congressional inquiries involving that subject were pending, could legitimately be regarded by the jury as an act of obstruction (rather than as a routine housekeeping matter, as defendant contends). The jury could likewise draw the inference from the evidence that defendant, while aware of a back-up tape system, also knew that the back-up tapes were to be routinely destroyed two weeks later, and that, with his specific destruction and the routine destruction of the back-up two weeks later, no trace of the incriminating notes would remain within a short time.[20]

D. *Counts Four and Five: False Statements*

With respect to Counts Four and Five, defendant argues that the evidence was insufficient to prove that he made the false statements, and that the statements were not material to the congressional inquiries.

First. Count Four alleges that on November 21, 1986 defendant made two false statements to the House intelligence committee—(1) that he did not learn until January 1986 that Hawk missiles had been shipped to Iran in November 1985; and (2) that he did not learn until November 20, 1986 that anyone in the United States government had prior knowledge of the November 1985 shipment. Count Five alleges that on November 21, 1986 defendant made a false statement to the Senate intelligence committee, namely, that he did not learn until January 1986

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[20] Defendant's arguments regarding the length of time it takes to delete 5,000 notes and the precise timing of his actions may have been relevant before the case went to the jury; they do not detract from the verdict now.

that Hawk missiles had been shipped to Iran in November 1985.[21]

Memoranda prepared by congressional aides present at defendant's meeting with the House committee proved that the statements described in Count Four were in fact made. A memorandum written by the committee's chief counsel, following his observation of the defendant's appearance at the November 21, 1986 meeting, records that defendant stated to the committee that, while the Israelis transferred eighteen Hawk missiles to Iran in November of 1985, the United States government did not learn about the event until January 1986 (Exh. 138). A memorandum prepared by the House committee's minority counsel similarly notes that while Israel shipped Hawk missiles to Iran in November 1985 without American governmental approval, Poindexter stated that "he learned *yesterday* that there may have been prior U.S. knowledge concerning the November 1985 Israeli arms shipment to Iran" (emphasis added). Exh. 135 at 7.

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[21] Defendant has argued that in giving the wrong date, he made at worst an insignificant five-week mistake. Tr. at 3230-32. But this five-week margin was far from trivial, for as Chairman Hamilton testified, if members of the House committee had known that the United States government or some of its officials had been aware of the November 1986 Hawk missile shipment when it occurred, they would have asked to see the authorization that the Foreign Assistance Act required for such shipments. The problem was that the only authority for the shipment was the Finding, signed by President Reagan in November or December 1985, which contained the politically damaging arms-for-hostages language that Poindexter and the others did not wish to reveal. Thus, by claiming that he did not become aware of the shipment until January of 1986, defendant was protecting against disclosure of the Presidential Finding—the same Finding he ultimately destroyed.

In the face of these memoranda, defendant does not dispute that he made a statement to the committee as to when the United States government learned of the Hawk missile shipment. His argument is only that the memoranda did not constitute proof of any statement as to when *he* learned of the missile shipment, the theory apparently being that he was not including himself in his reference to the United States government. This argument is frivolous on its face.[22]

Defendant's further point that the government did not prove that he made the statement to the Senate intelligence committee alleged in Count Five must fail for the same reasons. According to a staff member's memorandum regarding the November 21, 1986 committee meeting with defendant, "Poindexter said that he learned in January 1986 that Israel had sent 18 Hawk missiles to Iran on November 25, 1985 without U.S. approval" (Exh. 139 at p. 5). While defendant here again concedes that, by way of this memorandum, the government proved that he made the statement, he rejoins that his conviction of Count Five cannot stand because the false statement charged in the indictment does not contain the words "without U.S. approval," and that the government therefore failed to prove the precise wording of the false statement alleged in the indictment. Def. Reply Mem. at 9. However, clearly evidence which proves that a

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[22] Equally insubstantial is defendant's further contention that the memoranda do not support the proposition that he told the committee that November 20, 1986 was *the first time* that he found out that there may have been prior United States knowledge of the shipment. As the minority counsel's memorandum reports, Poindexter stated on November 21, 1986 that he "learned yesterday" of possible prior United States knowledge.

statement was made need not contain word-for-word the language charged in the indictment; such evidence does not become less probative because it includes additional, non-contradictory detail.[23]

Second. Defendant also argues that his statements were not material, in that they did not have the natural tendency to influence or the capability of influencing the decision of the tribunal. *Weinstock* v. *United States*, 231 F.2d 699, 701 (D.C. Cir. 1956). Specifically, the argument is that his personal knowledge of the shipments was not material to an investigation of intelligence aspects of United States government participation in the sale of arms to Iran. Def. Mem. at 11-12.

The Court dealt with the identical contention in disposing of defendant's pretrial motions, and it will simply reiterate here the pertinent portion of the ruling it made then, as follows:

> To be sure, the committees were investigating the issue of United States government involvement in sales of arms to Iran. But it was plainly material to that inquiry when the defendant—the President's principal advisor on national security and the senior officer of the NSC, the body identified with the Iran initiative—first learned of government involvement in the shipment of arms to that country.

725 F. Supp. at 27.

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[23] Any other rule would amount, among other things, to the requirement of a verbatim transcript in all section 1001 cases. Such a requirement has been rejected not only by this Court on defendant's pretrial motion to dismiss, *see United States* v. *Poindexter*, 725 F. Supp. 13, 25-26, but also by the cases cited by defendant. *See United States* v. *Poutre*, 646 F.2d 685, 688 (1st Cir. 1980).

On that basis, as well as on the basis of the testimony of Congressman Hamilton and Eric Newsome and of documentary evidence describing the purpose of the inquiries, the materiality of the statements was clearly established. In accordance with these disclosures, the Court decided as a matter of law, in accordance with binding precedent,[24] that the statements were material to matters within the jurisdiction of the congressional committees. The Court concludes that defendant's arguments regarding the lack of materiality of his statements are without merit.

For the reasons stated, the motion for a judgment of acquittal will de denied. The remainder of defendant's contentions, to which the Court now turns, advocate that a new trial be granted in the interest of justice. Fed. R. Crim. P. 39.

III

Kastigar Issues

A. *Precautions Against Taint*

The Court previously issued an Opinion which discusses in detail issues arising in this case under *Kastigar* v. *United States*, 406 U.S. 441 (1972), with respect to testimony defendant gave in 1987 before

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[24] *See United States* v. *Hansen*, 772 F.2d 940, 950 (D.C. Cir. 1985) (materiality question of law); *Weinstock* v. *United States, supra*, 231 F.2d at 703. However, the jury was also instructed that it was to determine whether the statements were false in regard to a matter within the committees' jurisdiction; whether or not the defendant knew and believed the statements were false at the time they were made; and if so, whether defendant made them consciously and deliberately, and not as a result of accident, mistake or other innocent reason. Tr. at 3373-74.

congressional committees under a grant of use immunity following his claim of self-incrimination under the Fifth Amendment. *United States* v. *Poindexter*, 727 F. Supp. 1488 (D.D.C. 1989).[25] The Court will now address specific assertions made in defendant's motion for a new trial.

Prior to and during the trial, the Court required the taking of extensive, and in some respects unprecedented, measures to ensure that Poindexter would not be convicted on the basis of testimony he provided under a grant of immunity. Thus, in advance of the trial, the Court directed the government to submit to the Court *ex parte* [26] (1) descriptions of the anticipated testimony of each potential government witness, (2) the leads that caused the government to question these specific individuals about the subjects on which they were to testify; and (3) the basis of each witness' knowledge of the facts to which he was expected to give testimony.

Upon a review of these materials, the Court concluded that "[w]ith respect to the bulk of the witnesses, all of their proposed trial testimony had been memorialized prior to [the date on which Poindexter gave his immunized testimony] by way of information these same persons had provided to the grand jury, the Federal Bureau of Investigation, the so-called Tower Commission, a congressional committee, or a combination of these." 727 F. Supp. at 1497 (footnote omitted). Having provided the information

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[25] Under date of March 8, 1990, the Court also issued a Memorandum dealing more specifically with the testimony of Oliver North in light of the *Kastigar* doctrine.

[26] The materials were subsequently made available to the defense.

before Poindexter even testified in Congress, the witnesses' evidence could not possibly have relied on his testimony.

However, with respect to five of the persons whom the government proposed to call as witnesses,[27] the Court concluded that it could not be certain of lack of taint on the basis of the papers submitted by the government, and it therefore ordered the holding of hearings at which these five individuals would be questioned and cross-examined. Accordingly, a two-day hearing was held, and at its conclusion the Court made specific factual findings regarding the ability of these proposed witnesses to testify without infringing upon defendant's Fifth Amendment rights.

At the trial itself, the Court carefully instructed each goverment witness[28] to testify from personal knowledge only, deriving no evidence from Poindexter's immunized testimony, and each witness affirmed on the record that he or she understood the Court's admonition. Because of its possession of the government's underlying source materials, the Court was able to ensure that the witnesses did, in fact, restrict themselves to the facts covered in the documents contained in the pretrial submissions.[29]

Further, as the Court's previous *Kastigar* Opinion relates, the Court also took appropriate precautions

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[27] These five witnesses were Ronald Sable, Rafael Quintero, Kenneth deGraffenreid, Karna Small, and Oliver North.

[28] Out of an abundance of caution, and although this may not be necessary under the law, the Court also instructed the defense witnesses to the same effect.

[29] As it admitted government exhibits into evidence without defense objection, the Court was also able to observe that each of them predated Poindexter's immunized testimony.

with respect to the lack of taint of grand jurors, grand jury witnesses, and government counsel.[30] 727 F. Supp. at 1493-96.

B. *Post-Trial Hearing*

In the course of its consideration of the *Kastigar* issues, the Court indicated that, if this appeared necessary, it would hold another *Kastigar* hearing at the conclusion of the trial to determine whether additional measures were required. 727 F. Supp. at 1501. Upon full consideration of the issues, the Court has now concluded that, in view of the steps taken throughout the proceedings, such a hearing would be redundant.

In a footnote buried in his Memorandum in support of its motion for a new trial (Def. Mem. at 17 n.10), defendant makes a curt request for such a hearing.[31] However, other than to state that the gov-

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[30] Two members of the prosecution's trial team, including the chief counsel, were required to submit to a hearing, with cross-examination by defense counsel, to determine their exposure, if any, to the immunized testimony. Prior to, and in preparation for, the hearing, defendant was granted discovery of the counsels' personal and professional records for the period surrounding the immunized testimony. Both counsel were ultimately found to be free of taint.

Further, throughout the proceedings, to and including the drafting and submission of the memoranda in opposition to defendant's current motions, the prosecution has maintained a rigid wall between attorneys working on *Kastigar* issues and those who were not exposed to taint from immunized testimony.

[31] The footnote also requests discovery, including access to the ex parte filings of witnesses who never testified.

ernment should at such a hearing be required to demonstrate that it "made no evidentiary or nonevidentiary use of the defendant's immunized testimony in the trial and pretrial stages of this case," the Memorandum furnishes no clue as to what might be considered at such a hearing that has not already been the subject of examination, cross-examination, and proof. Both the generality of the request and its placement in the Memorandum suggest that the footnote did not constitute a serious request for a hearing.

In his Reply Memorandum, defendant expands somewhat upon the earlier footnote, demanding that at the anticipated post-trial *Kastigar* hearing, the government be required to prove that all evidence considered by the grand jury or at trial was derived from independent sources, and that no other use, evidentiary or nonevidentiary, was made of immunized testimony. Toward that end, according to defendant, the government should be required "to call as witnesses all grand jury and trial witnesses,[32] all grand jurors[33] and petit jurors,[34] and each member

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[32] The trial witnesses would apparently be required to be examined irrespective of whether or not they have already testified at a *Kastigar* hearing. *See also*, pp. 31-43, *infra*.

[33] Presumably irrespective of Rule 6(e), Fed. R. Crim. P. (grand jury secrecy).

[34] Presumably irrespective of the fact that the petit jurors were selected individually, by a careful process that defense counsel fully participated in, and that eliminated everyone who had as much as heard of Poindexter's congressional testimony, as well as everyone else with respect to whom there was the slightest doubt regarding taint. At the conclusion of the voir dire, defense counsel were fully satisfied regarding lack of taint.

of the prosecution staff who assisted in the case." [35] Def. Reply Mem. at 11.

Defendant's demand is not only oblivious of the proceedings related in notes 32 through 35 in most of which he participated to his complete satisfaction, but he also fails to give any reason for his current demand. Indeed, notwithstanding that participation as well as the voluminous and exhaustive documentary material bearing upon any possible source of taint furnished to him pursuant to the Court's orders, defendant has not pointed to a single name, incident, or suspicious circumstance that, even in his view, would require or benefit from further exploration at another *Kastigar* hearing.

Thus, the question is whether a defendant is entitled, in addition to the *Kastigar* precautions summarized above, to a post-trial *Kastigar* hearing of enormous scope without making any showing whatever of purpose or need. Defendant has cited no legal precedent for such a request under such circumstances.[36] The request becomes even less defen-

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[35] Presumably irrespective of the thorough precautions taken with respect to government counsel (*see* 727 F. Supp. at 1494-96), and the receipt by defendant, pursuant to an order of the Court, of all the government's files on any accidental or inadvertent exposure of staff members to publicity regarding defendant's congressional testimony. *See United States* v. *Hampton*, 775 F.2d 1479, 1490 (11th Cir. 1985).

[36] Defendant may be attempting to resurrect the nonevidentiary taint claim which the Court has rejected, as have almost all the appellate courts. *See* discussion in 727 F. Supp. at 1291-93; *and see, United States* v. *Rinaldi*, 808 F.2d at 1583-84.

Nor do the decisions cited by defendant support his demand. Most of them involved extraordinary exposure to im-

sible in view of the specific findings the Court made of an absence of taint with respect to every category of participants defendant has mentioned. *United States* v. *Rinaldi*, 808 F.2d 1579 (D.C. Cir. 1987).[37]

The law does not support defendant's demand. Our Court of Appeals has held that the procedures used to avoid taint are within the sound discretion of the trial court, *United States* v. *Poindexter*, 859 F.2d 216, 222 (D.C. Cir. 1988); *United States* v. *De Diego*, 511 F.2d 818, 823-24 (D.C. Cir. 1975), and that court has also expressly endorsed the type of pre-trial procedures this Court has employed. *Id.*

For the reasons stated, the Court has concluded that an additional *Kastigar* hearing is unnecessary,

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munized testimony, such as where the defendant gave immunized testimony to the very grand jury that later indicted him, *United States* v. *Garrett*, 797 F.2d 656 (8th Cir. 1986); *United States* v. *Hampton*, 775 F.2d 1479 (11th Cir. 1985); *United States* v. *Hinton*, 543 F.2d 1002 (2d Cir. 1983), or where the district attorney who conducted the prosecution had immersed himself in that testimony. *See United States* v. *Semkiw*, 712 F.2d 891 (3rd Cir. 1983) (prosecutor read and was "familiar with" defendant's immunized testimony); *United States* v. *McDaniel*, 482 F.2d 305 (8th Cir. 1973). These are circumstances which even defendant does not claim to be present here.

[37] Defendant also demands that he "should be permitted to subpoena relevant documents from the witnesses and should be permitted to offer witnesses in its behalf." Def. Reply Mem. at 11. Here again, the demand could hardly have been made with serious intent. Not only is no reason given why these extraordinary measures are necessary in light of those already taken, but again, not a single precedent by any court has been cited for or has been found by the Court to endorse such a request.

and defendant's request for such a hearing is therefore denied.

C. *Oliver North*

As the Court's Memorandum of March 8, 1990 has developed more in detail, Oliver North testified at the *Kastigar* hearing held at the direction of the Court that he was unable, with respect to any subject, to distinguish between what he had personally done, observed, or experienced and what he had heard about the events by way of Poindexter's immunized testimony. Although the Court was deeply suspicious about this facile expedient for escaping his obligation to testify in the trial of this case,[38] it decided initially to take North's claims at face value.[39]

Subsequently the Court granted a government motion to require North to testify regarding the destruction by Poindexter of President Reagan's 1985 Iran Finding, upon the Court's conclusion that this testimony would be untainted, as North had testified at his own trial that he had personally seen Poindexter tear up that document. The Court further found as a fact that North's subsequent claim, that what he knew about that document destruction he learned from watching Poindexter testify on television, was totally incredible.[40]

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[38] North was granted immunity with respect to his testimony in his Poindexter trial and was ordered to testify.

[39] North was not relieved of the obligation to testify with respect to certain evidentiary areas even then.

[40] This conclusion did not represent an about face from the Court's December 19, 1989 Opinion on *Kastigar*, as defendant argues. In that Opinion, the Court expressed a willingness to accept as a general proposition North's assertion

The Court's decision to credit North's trial testimony over the account he provided at the *Kastigar* hearing [41] was based on a number of factors.[42]

First. It is inherently incredible that, as he claimed at the *Kastigar* hearing, North did not remember his participation in an event he witnessed first hand and that was as dramatic, indeed historic, as the tearing up of an extremely rare Presidential Finding. and one, moreover, that authorized the covert sale of arms to Iran where the Ayatollah Khomeini was still in power. It also defies common sense to believe that the destruction of one of the few documents capable

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of an inability to distinguish between his own conversations and the version of events described in defendant's immunized testimony, on the theory that it would not otherwise be able to find an independent basis of knowledge. 727 F. Supp. at 1500. However, with respect to the particular issue under consideration here, North has provided the Court with such independent evidence by way of his own trial testimony—testimony that, as discussed below, is entirely credible and is on that basis accepted by the Court.

[41] Defendant argues that this conclusion amounts to an impermissible inference of a lack of taint. However, the Court has not inferred an absence of taint; rather it has made a specific finding of fact based on North's testimony at his own trial and at the *Kastigar* hearing that the testimony was not tainted. *See United States* v. *Rinaldi, supra,* 808 F.2d at 1584.

[42] The government need only make its showing of the independence of its trial evidence from immunized testimony by a preponderance of the evidence. *United States* v. *Overmyer,* No. 89-3696, slip op. at 11 (6th Cir. March 26, 1990); *United States* v. *Hampton,* 775 F.2d at 1485; *United States* v. *Contreras,* 755 F.2d 733, 735 (9th Cir. 1985); *United States* v. *Romano,* 583 F.2d 1, 7, (1st Cir. 1978); *United States* v. *Seiffert,* 501 F.2d 974, 982 (5th Cir. 1974).

of justifying North's actions in connection with the sale of arms to the Iranians slipped from his mind until he heard defendant mention it on television.[43]

Second. A critical factor leading to the Court's credibility determination was North's demeanor at the *Kastigar* hearing. Because both the government and the defendant have, at different times, attacked North's credibility, the opportunity to observe him took on special importance. North's manner during the hearing was evasive, disingenuous, and argumenative. His tone was at times sarcastic and frequently hostile to the questioners. He exhibited a strong bias in favor of Poindexter, his former colleague and co-defendant, the only one who, according North, "didn't hang Ollie North out to dry." His assertion of having been heavily influenced by defenddants's immunized testimony was enthusiastic and eager rather than reluctant. The Court found then, and it finds now, that North's demeanor was that of a witness who is not telling the truth.

Third. By contrast, the testimony North gave at his own trial on this issue was highly credible. On cross-examination at that trial, he initially denied knowing what had happened to the Finding. Under further questioning, he claimed that Poindexter had merely told him that the Finding had been destroyed, but when the government persisted, he admitted that "I was there" when Poindexter tore up the Finding:

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[43] According to North, the refusal of top Reagan Administration officials to make the Finding public was "leaving a heck of pickle for the people who have to explain how you ship 12 to 15 or $20,000,000 worth of arms." North trial Tr. at 7612.

Q: You were present when he destroyed it?

A: Yes, I was.

Q: I thought you just told the jury that you were told he destroyed it?

A: Well, I saw the Finding torn up. I don't know what—as I said, the pieces of it I don't knew where it went, but I saw him tear it in two.

North Tr. at 7613.[44]

Fourth. The conclusion that North had a basis of knowledge independent of Poindexter's congressional testimony is also supported circumstantially by the fact that North's testimony differs in minor but significant respects from defendant's immunized account. For example, Poindexter told Congress that he ripped up the finding and threw it in the burn basket behind his desk.[45] North, after first disagree-

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[44] Defendant suggests that North saw the Finding destroyed, but may not have known at the time what the document was. North's testimony at his own trial refutes that claim as well:

Q: Do you recall having any discussion, was there any discussion, between you, Admiral Poindexter or Paul Thompson [a military aid to Poindexter who was also present when the Finding was descroyed] about whether it was a good idea to rip up an original and for all you know, only copy of a Presidential document?

A: As I recall, the discussion solely focused on the fact that the replacement Finding supplemented or succeeded it, and that this Finding was no longer valid. It was no longer valid and hadn't been.

North Tr. at 7618.

[45] *Joint Hearings Before the House Select Comm. to Investigate Covert Arms Transactions with Iran and the Senate Select. Comm. on Secret Military Assistance to Iran and the*

ing with a question that asked whether the defendant had "ripped [the Finding] into shreds," testified that he had seen Poindexter "tear it in two" and "put it on behind his desk, put it on the table perhaps." *Id.* at 1250-52.[46]

Fifth. Even the facts underlying the arguments advanced by defendant support, rather than detract from, these conclusions.

Thus, defendant relies on North's reference to the political embarrassment likely to result from a revelation of the Finding with its arms-for-hostages language, as demonstrating that the North evidence must have stemmed from the Poindexter immunized testimony. To be sure, Poindexter, like North, did mention political ramifications when he testified before the congressional committees. However, a comparison of the two sets of answers indicates that the testimony North gave could not have been derived from Poindexter's immunized answers, for it differed from those answers in significant respects:

> 1. North testified that concern about political effects of the Finding was shared by (White House Chief of Staff) Don Regan and "political

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Nicaraguan Opposition, 100th Cong., 1st Sess., Vol. 100-8, Pt. I (*Joint Hearings*) at 202-1.

[46] North's testimony demonstrated that he not only knew of the Finding but was quite familiar with it. Thus, he informed the congressional committees that he believed he had seen a signed copy of the Finding in Poindexter's office in early 1985. *Joint Hearings* at 33-34, 72; *accord id.* at 41 ("I believe there was dialogue with the Attorney General at about that point in time before and during the November Finding was sent over and signed"); *id.* at 224.

people up the line." Poindexter never mentioned anyone but himself.

2. North testified that he was told not to reveal the Finding to Congress because of its political ramifications. Poindexter did not discuss the need to keep the Finding from Congress.

3. North asserted that the decision by the "political people" not to use the Finding to explain the arms sale to Congress was leaving people like himself in "a heck of a pickle" (*see* note 43, *supra*). Poindexter offered no such testimony.

4. North suggested that President Reagan, Poindexter, and CIA Director Casey were less than candid with Congress because they failed to disclose the Finding. According to North, this lack of candor was motivated by the Finding's political ramifications. Poindexter did not discuss the failure of Reagan, Poindexter, and Casey to reveal the existence of the Finding to Congress.[47]

The situation is similar with regard to North's testimony about a conversation in preparation for his August 6, 1986 meeting with members of Congress. Here again, the references prove the opposite of the sense defendant attributes to them.

Both men testified that, in conversation with Poindexter prior to North's appearance at the meeting with members of the House intelligence committee, North expressed concern about the questions he would be asked. From that point on, their accounts diverge

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[47] *Compare* transcript of North testimony at his own trial at pp. 7611-12 with transcript of Poindexter's congressional testimony at 17-20.

sharply. When North testified, he stated that Poindexter told him, "You can handle it" or "You can take care of it." Poindexter's immunized testimony, on the other hand, was that "North said he could handle it." In other words, Poindexter recalled North as offering to mislead the Congress, and North remembered Poindexter as directing him to do so. Rather than to mesh, as would be true if North's testimony was based on Poindexter's, their testimony conflicted dramatically, with each blaming the other for North's false statements to the congressional committee.[48]

The Court finds once again that the testimony of Oliver North regarding the destruction by defendant of the 1985 Presidential Finding had a basis independent of defendant's immunized testimony.

D. *Congressman Hamilton*

Poindexter claims that Representative Lee Hamilton improperly testified regarding the destruction of the Finding. The issue arose in the following manner. Asked whether Poindexter had ever acknowledged destroying the Finding, Hamilton replied that "He did." "When was that," the prosecutor asked. "It was in—" Hamilton began before the Court cut him off.[49] Defendant thereupon moved for a mistrial on the ground that Hamilton's statement appeared to be based on defendant's immunized testimony.

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[48] North, moreover, recalled various details not available in defendant's testimony. *See* March 8, 1990 Memorandum at 6-7.

[49] The Court had cautioned Hamilton, like all other witnesses, not to rely in his testimony on information he might have acquired during Poindexter's congressional appearance.

The Court denied the motion because the testimony was both cumulative and harmless. By that time, North had already testified that he had seen Poindexter destroy the Finding, and defense counsel had acknowledged this same fact in his opening statement. Hamilton's fleeting testimony imparted no substantial information not already before the jury.[50]

Defendant now argues additionally[51] that Hamilton's testimony should not be considered cumulative, both because Hamilton was more credible than North, and because the Congressman testified that defendant admitted to destroying the Finding while North stated that he witnessed the event. Elsewhere, however, defendant claims that the Court's pretrial ruling allowing North to testify about the Finding had forced him to address the issue in his opining statement (Def. Mem. at 24 n.14)—an implicit assessment that the jurors would accept North's account. That being so, defendant cannot also claim that the jury would have disbelieved North's testimony on the issue but for that provided by Hamilton.[52]

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[50] *Cf. United States* v. *Fuller*, 768 F.2d 343, 347 (1st Cir. 1985) ("[i]n light of the jury's previous knowledge" of facts at issue, improper testimony by government witnesses could not have been so prejudicial that it denied defendant a fair trial).

[51] Defendant also claims that the introduction of any immunized testimony at trial constitutes per se reversible error. However, *Kastigar* itself counsels against a per se reversal rule. 406 U.S. at 458-59. The purpose of use immunity is to leave the witness in "substantially the same" position as if he had never testified, not in the identical position. *Id. See also, United States* v. *Serrano*, 870 F.2d 1, 17 (1st Cir. 1989).

[52] Indeed, given that defendant never challenged this aspect of North's testimony on cross-examination, his argument that

E. *Ronald Sable*

Defendant also claims that "other witnesses" gave unspecified trial testimony derived from his immunized testimony. The only concrete facts offered in support of this claim are three snippets of testimony given by Ronald Sable.

Two of these three examples are drawn from questioning of the witness by defendant's own counsel. On direct examination by the government, while Sable was being questioned about the process by which Poindexter responded in 1986 to the three congressional letters, he was not asked about the truthfulness of the letters. On cross-examination defense counsel asked Sable, over the government's objection, whether the letters were false. Sable then replied, "Nothing in that letter, that I was aware of a that time was false." Tr. at 1924.[53]

The second example is similar. Defense counsel asked Sable on cross-examination, "And during that last week in November of 1986, are you aware of the fact that Admiral Poindexter engaged in any massive shredding of documents?" The following exchange ensued:

A: Was I aware of it then?

Q: Yes.

A: Or am I aware of it now?

Q: Then.

A: I am not.

Tr. at 1944.

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the jury might have disbelieved him but credited Hamilton's testimony on this point, rings somewhat hollow.

[53] It is presumably the "at that time" reference to which defendant objects.

The third bit of allegedly tainted testimony was given when the government asked Sable on rebuttal, "And did you know at that time that the letters . . . were false . . . ." Sable replied, "I did not." Tr. at 1956.

This colloquy, as indeed the others, does not evidence taint, but rather a diligent effort by both the witness and the government to comply with *Kastigar*. While the testimony suggests that Sable initially thought the letters to be accurate but that he may have subsequently changed his mind, it implies nothing about why he did so: nothing in his testimony links his change of mind to Poindexter's immunized testimony. In any event, defendant cites no authority or support for the proposition that taint may arise from the mere implication of information not in evidence.

IV

Use By Government of False Testimony

By a motion filed prior to the trial, defendant sought to exclude entirely the testimony of Oliver North on the basis that "the Government knows or has reason to know that the testimony will be false." [54] The Court

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[54] Def. Mem. at 41-50. This motion was not the only one dealing with North's testimony and his credibility as a witness. While North testified on direct examination on March 2, 1990, the government moved in limine for leave to impeach him by eliciting evidence of his prior criminal convictions. The defendant promptly filed an opposition, stating that he would oppose the admission of such evidence unless evidence of North's acquittals could come in as well. The Court denied the government's motion from the bench, holding that the information being sought would be prejudicial to the defendant unless he were permitted to bring out also the details of

denied that motion by a Memorandum dated March 8, 1990, upon the government's representation that it had no intention of eliciting false testimony. Beyond that, it was the Court's decision then, as it is its view now, that the prosecution is not precluded from calling as a witness an individual solely on the ground that he has previously made false statements on matters with respect to which he will not be asked to testify at the forthcoming trial.[55]

The contrary rule advocated by defendant would bar the testimony of many individuals who were members of organized crime, of drug conspiracies, or of other criminal groups and combinations, and who ultimately decide to cooperate with and testify for the government. Every trial judge, prosecutor, and criminal defense lawyer encounters almost daily witnesses for the government who may be unsavory with respect to credibility and otherwise, but who are nevertheless not precluded from testifying against other

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the counts of which North was acquitted, but that this kind of exploration of the complicated result of North's trial would be confusing to the jury and would constitute an undue waste of time.

[55] Defendant makes the blanket assertion that the government used testimony in his trial that it had "repeatedly argued in the trial of Mr. North . . . was false." Def. Mem. at 49. The government's arguments in North's own trial that that individual had perjured himself were limited to a distinct topics, which are not among defendant's list of allegedly false statements. Gov. Mem. at 25 n.11.

The fact that North may have provided marginally different testimony on some of these subjects when he testified before Congress does not mean that the earlier tstimony was true and that the North testimony at Poindexter's trial was false. North was a witness who at times contradicted himself and who often testified with calculated ambiguity.

members of the particular organization or against individual offenders about whom they possess evidence. Defendant's proposed rule would outlaw all such testimony, and it has accordingly never been accepted by the courts, other than in special situations not even remotely resembling this one. *See* note 61, *infra*.

Defendant is now pursuing the same issue in this motion for a new trial,[56] and he has cited some fourteen incidents in the course of North's testimony at the Poindexter trial which, allegedly to the prosecution's knowledge, was false or misleading. The Court has reviewed the incidents cited, and it finds defendant's facts and the arguments based thereon to be unconvincing. With respect to a substantial number of these occurrences, there is no credible showing that the North testimony was false. In fact, defendant's proof of the falsity of North's testimony often simply assumes the truth of hypothetical testimony of other witnesses the defendant could have, but did not, call at trial,[57] or it consists of defendant's own interpre-

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[56] During the trial, Poindexter filed a motion in limine for leave to introduce the prosecution's prior statements concerning the truthfulness of North, but that motion was rendered moot when defendant suddenly rested his case the day after briefing on the motion had been completed. There is some doubt whether, given the effective abandonment of the point by defendant during the trial, he may raise it now. Nevertheless, the Court has considered the issue on its merits.

[57] For example, with respect to three items, defendant supports his claim of the falsity of North's testimony on evidence Robert McFarlane or Richard Secord might have given (although defendant did not call them as witnesses). But it is the function of cross-examination, not of a hypothetical pairing of evidence given in different proceedings involving different parties, and arising at different stages

tation of what is true and what is false.[58] As for the remainder, (1) there is no indication that the government was aware that North would give the false testimony,[59] and (2) the allegedly false statements were either fully explored by way of cross-examination or easily could have been.[60]

What defendant's contention amounts to is this: unable to impeach the verdict directly because of the obstacle presented by the doctrine that it is the jury's responsibility to determine credibility, he seeks to overturn the jury's credibility determinations by the convoluted method of claiming that North lied, that the prosecution knew or should have known that he would give false testimony, and that its failure to

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and circumstances, that establish truth or falsity for litigation purposes.

[58] The lengths to which defendant would have the Court go are illustrated by an incident with respect to which he wishes the Court to assume both the falsity of North's testimony and the prosecution's knowledge of falsity because of "identical tears" North shed about his particular "lies" at the North and Poindexter trials. Def. Mem. at 44.

[59] North could hardly be regarded as being completely under the prosecution's control. His interests were, first, to protect himself; and second, to assist Poindexter if he could do so without damage to himself.

[60] Defendant's alternative theory—that the government elicited certain testimony which was "presumptively unreliable" because it was the result of North's trial strategy of shifting blame to others—is equally unavailing. It is not the law that a co-conspirator may not testify about the conduct of another co-conspirator simply because he has a motive for shifting responsibility to that person. If that were the case, defendants could always prevent the government from calling co-conspirators as witnesses. That kind of issue is likewise a matter for cross-examination.

stop or correct him amounted to a denial of due process. As the government correctly points out,

> If a defendant could gain a new trial every time a prosecution witness contradicted himself in a manner that might be, or actually was, contradicted by defense evidence, or every time a prosecution witnness failed to put the "spin" on the known facts that defendant would prefer, then criminal convictions would truly be an endangered species.

Gov. Mem. at 29.[61]

Defendant had a full and fair opportunity to cross-examine Oliver North, to attack his credibility, and to present to the jury any motive North may have had for testifying the way he did. To perform that task, defendant was given access to all of the transcripts of North's prior testimony in various proceedings, and he was able to use these transcripts in preparation for his case and in North's cross-examination. Defendant also had the option of calling witnesses such as Robert McFarlane, Richard Secord, NSC and CIA personnel, and others, to dispute the story told by Oliver North. If in addition to all of this, the Court were to provide to defendant the relief he re-

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[61] The "false testimony" decisions upon which defendant relies differ from the instant case in two major respects. First, these decisions involved actual use by the prosecution of specific perjurious testimony to secure convictions. *See, e.g., Giglio* v. *United States*, 405 U.S. 150 (1972) (prosecution's failure to make known to defendant that leniency had been promised to defendant in return for his testimony). Second, the cases arose generally in the context of motions for a new trial or on a writ of habeas corpus, on the ground of *newly-discovered evidence*. *See also*, the Court's March 8, 1990 Memorandum.

quests, its action would be tantamount to requiring the government to switch sides and make out Poindexter's case for him.[62] No principle of law requires such an exercise.

V

Exclusion of Defense Witness

Defendant also complains about the exclusion of a witness, one Victor Johnson. Def. Mem. at 84. The defense proposed to call Johnson, a congressional aide. to have him testify, as a defense to the charges, that House Resolution 485 was politically motivated and that in his opinion consideration by the committee of the Resolution was a political ploy. The government filed, and the Court granted, a motion in limine to exclude the Johnson testimony. The Court concluded that it would not be a defense to charges of obstruction that a Member of the committee had political motives in supporting the legislative activity being obstructed, and even less so that an aide to a Congressman may have had such motives. The Court now reaffirms that ruling.

It clearly would not be a valid defense to a charge of failure to comply with congressional legislation or one to obstruct a congressional investigation that political motives entered into the legislative decision to hold the hearings being obstructed or to enact the legislation being violated. The uncertainties of such

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[62] If instead of requiring the defendant to cross-examine adverse witnesses or to undermine their testimony with defense evidence, the government had the burden to correct what defendant or a court may contemporaneously or subsequently regard as "misleading" information, the government would in effect be required to do the defendant's lawyering for him.

a process, the judicial intrusions into legislative decisionmaking, and the need to have the courts examine and weigh the motives of lawmakers that would be the inevitable by-products of the acceptance of such a defense [63] militate decisively against such a step.

If the existence of a political component vitiated the legitimacy of a legislative activity so as to permit lying, obstruction, or defiance with respect thereto, few false statements or obstructions could ever be prosecuted, for political motives of one sort or another could always be found or at least asserted by way of someone's testimony. No court decision supports such a rule, and its adoption here for the first time is precluded by common sense as well as by a proper regard for the legitimacy of actions of a coordinate branch of government.

Moreover, if Johnson had been allowed to testify in this vein, the Court would have been obliged, of necessity, to allow the government to bring in witnesses to assert that politics had little, if anything, to do with the inquiry or the purposes of particular committee members, with defendant then presenting further witnesses to contend that these or other mem-

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[63] Congressional activities and decisions may safely be assumed sometimes to contain a political component, although the influence of that component on ultimate decisions, and even what is political as distinguished from statesmanlike, are issues that are probably impervious to measurement. Furthermore, in the context of defendant's request, the obvious question presents itself as to the number of Members of Congress on a committee who would have to have proven motives of a political nature and at what strength, in order, in effect, to nullify the legitimacy of the congressional action that was being obstructed.

bers or staffers did have political motives. The Court was not required to enter that quagmire. *See* Rule 403, Fed. Rules of Evidence.[64]

VI

Jury Instructions

Defendant argues next that the Court erred in a number of respects in its instructions to the jury.

A. *Limiting Instructions*

Defendant contends that the Court committed an error in failing to instruct the jury *sua sponte* that the testimony of Oliver North concerning defendant's destruction of the Presidential Finding was admitted solely for the purpose of proving defendant's intent. That argument is not well taken for a variety of reasons.

First. With but two exceptions, *see* note 65, *infra*, the Court of Appeals for this Circuit has refused to require a *sua sponte* limiting instruction except in case of evidence admissible solely for purposes of im-

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[64] Defendant also claims that, in view of the Court's refusal to permit the testimony of Victor Johnson, the jury was able to hear only from Representative Lee Hamilton, a supporter of the congressional inquiry, but not from any opponent, and that this was unfair. Although, as indicated above, it was not necessary to permit the testimony, as such, of either proponents or opponents of the inquiry, in fact Congressman Henry Hyde, a congressional opponent of the Hamilton position, who testified on other matters, took the opportunity to state in no uncertain terms that in his view H. Res. 485 amounted to little more than an effort to garner press attention and take "shots" at the White House. Tr. at 2715.

peachment by prior criminal acts. *See United States* v. *Johnson*, 802 F.2d 1459, 1466 (D.C. Cir. 1986); *United States* v. *Lewis*, 693 F.2d 189, 196-97 (D.C. Cir. 1982); *United States* v. *Childs*, 598 F.2d 169 D.C. Cir. 1979); *United States* v. *Herron*, 567 F.2d 510, 515 (D.C. Cir. 1977); *United States* v. *Henson*, 486 F.2d 1292, 1299-300 n.6 (D.C. Cir. 1973) (en banc); *United States* v. *Thomas*, 450 F.2d 1172, 1174-75 (D.C. Cir. 1972); *United States* v. *Fench*, 470 F.2d 1234 (D.C. Cir. 1972); *United States* v. *Bobbitt*, 450 F.2d 685 (D.C. Cir. 1971).[65]

That limitation makes sense All or almost all evidence is produced at trial for a particular purpose—*e.g.*, to prove an act, to constitute evidence of intent, to prove that a statement was made by a particular individual, to demonstrate the presence of certain participants at a meeting—so as to contribute to the mosaic that constitutes the case that is ultimately presented by each party. It would be well-nigh impossible, and plainly inconsistent with an orderly trial,

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[65] The exceptions are *United States* v. *McClain*, 440 F.2d 241, 246 (D.C. Cir. 1971), and *United States* v. *Freeman*, 514 F.2d 1314, 1320-21 (D.C. Cir. 1975). To the extent that language in these cases goes beyond the subject of impeachment, subsequent Court of Appeals decisions have limited or distinguished them. Moreover, unlike here, in both *McClain* and *Freeman*, the evidence was admissible for no other purpose than that for which it was, in fact, admitted. Finally, the Supreme Court has rejected *McClain's* approach to waiver and plain error, holding that failure of the defendant to make a contemporaneous objection amounts to a waiver, and that plain error occurs only where the evidentiary ruling undermines the fundamental fairness of the trial, taking into account the weight of the evidence. *United States* v. *Young*, *supra*.

to identify each such bit of evidence by announcing its specific purpose to the jury.[66]

Second. In any event, the premise of defendant's argument is false, for the destruction of the Finding was not admissible only on the issue of intent; it was also substantive evidence going to Count One as proving a conspiratorial act (Tr. at 2483). On this basis, an instruction limiting evidence of the act of destruction to the question of intent was not required.[67] *United States* v. *Johnson*, 802 F.2d 1459, 1466 (D.C. Cir. 1986); *United States* v. *Childs*, 598 F.2d 169, 175 (D.C. Cir. 1979); *United States* v. *Herron*, 567 F.2d 510, 516 (D.C. Cir. 1977).

Third. The decision of the Supreme Court and of the Court of Appeals for this Circuit since *McClain* have made it clear that, except in the most egregious circumstances, the failure of the defendant to raise the matter during trial operates as a waiver. *See, e.g., United States* v. *Young, supra*, 470 U.S. at 19-20; *United States* v. *John Doe, infra.* Such a waiver is particularly appropriate where, as here, it was unclear, at best, whether the instruction needed to be

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[66] Indeed, the judge could not possibly do so, for, in the absence of objection, he frequently does not know the precise purpose for which evidence is introduced. At least in the early stages of a trial, only the two sides have a full picture of the case in mind.

[67] While the Court explained during the trial that the destruction was evidence only of specific intent, this was not limited to Count One but had application also to intent regarding the other counts. Moreover, as noted, destruction of the Finding was also admissible as evidence of an overt act. The Court's explanation therefore provided defendant with a benefit to which he was not entitled, and the failure to give a limiting instruction could not have prejudiced him.

given at all, inasmuch as the proof at issue was not impeachment evidence.

It is apparent that, on a waiver rationale, defendant has forfeited his right to an objection on this issue, for he failed to raise it on several appropriate occasions or, having raised it, abandoned it.

Thus, after the Court on March 8, 1990 denied defendant's motion in limine to preclude testimony that Poindexter had torn up the Finding (the sole ground asserted being that this would violate defendant's privilege against self-incrimination) defendant did not request a limiting instruction or any further other action by the Court. Likewise, on the next occasion when the subject arose—when the government elicited testimony concerning the document destruction from Oliver North during the trial itself—defendant again failed to make any request for a limiting instruction, such as to suggest, as he does now, that the testimony be received only for the purpose of proving defendant's specific intent.

The only effort defendant made to secure a limitation came at the end of the trial, during a conference to discuss jury instructions, and the Court immediately accommodated his request. At that time, defendant asked that the instructions advise the jury that the evidence was not to be regarded as substantive evidence of document destruction by Poindexter as an object of the conspiracy. The Court thereupon modified its proposed charge on Count One to specify that, with respect to document destruction, the jury was to consider only such destruction by North. After making the change, the Court asked defense counsel whether "that will take care of your problem?" to which two members of defendant's trial team an-

swered in the affirmative, Tr. at 3080, thus waiving any objection to the manner of the instruction.

B. *Knowledge of Pending Congressional Inquiries*

Defendant contends next that the Court improperly instructed the jury on the knowledge requirement of 18 U.S.C. § 1505, the Obstruction of Congress statute. The Court instructed the jury that it had to decide, as an element of the offense, "whether the defendant knew or had reason to know" that the congressional inquiries were being conducted when he committed the acts of obstruction. Defendant asserts that the jury should instead have been instructed that it could convict defendant only if he "knew or believed" that such inquiries were being conducted. The instruction given is fully consistent with the law.

Section 1505 makes it an offense to impede or obstruct the due and proper exercise of the power of inquiry or investigation by a congressional committee. The phrase "reason to know" correctly informed the jury that, in determining the defendant's state of mind, it could infer from the circumstances that he was aware of the relevant congressional investigations.

The decisions which have considered the knowledge element of section 1505, as well as the texts, have taken the same approach as did the Court here.[68]

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[68] The decisions cited by defendant (Def. Mem. at 26) are not to the contrary. Thus, in *United States* v. *Vesich*, *infra*, the court rejected an argument for reversal based on the proposition that the defendant did not have knowledge of the pending judicial proceeding, holding that "the accused must have knowledge *or notice*" of the fact of the proceeding (emphasis added). In the other cases cited by defendant (*United States* v. *Capa*, 791 F.2d 1054 (2d Cir. 1986); *United*

In *United States* v. *Sutton*, 732 F.2d 1483, 1490 (D.C. Cir. 1984), the Court of Appeals stated that the jury "could have reasonably inferred from the service of the subpoena . . . and from the evidence of defendant's subsequent behavior that defendant knew about the DOE audit." This conclusion, of course, relates to the objective factors going to the defendant's knowledge rather than to an examination of his beliefs.[69]

The fallacy inherent in defendant's argument is highlighted by his claim that the Court's instruction did not inform the jury that, in order to convict him of the obstruction charges, it had to find him to have acted with specific corrupt intent. Def. Mem. at 59. But the Court instructed the jury directly on just that:[70] that defendant could be convicted only if he acted corruptly, and it defined "corruptly" as requir-

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States v. *San Martin*, 515 F.2d 319 (5th Cir. 1975); *Broadbent* v. *United States*, 149 F.2d 580 (10th Cir. 1945)), the issue whether an objective test satisfies the statute is not discussed. (As for *United States* v. *Williams*, 470 F.2d 1339 (8th Cir. 1937), it appears to deal with a House committee's requirements regarding interference with communications to a criminal investigator.)

[69] *See also*, 2 L. Sand, J. Seiffert, W. Modern Federal Jury Instructions 46-32 citing *United States* v. *Henderson*, 74 Cr. 114 (S.D.N.Y. 1974); *United States* v. *Vesich*, 724 F.2d 451, 457 (5th Cir. 1984); *Pettibone* v. *United States*, 148 U.S. 197, 206 (1983); *Kloss* v. *United States*, 77 F.2d 462, 464 (8th Cir. 1935) (stating that in *Pettibone* "[c]learly the Supreme Court held in mind that notice that was all that was required, and notice is not so strong a requirement as knowledge").

[70] *United States* v. *Tarantino*, 846 F.2d 1384, 1400-01 (D.C. Cir. 1988), teaches that on an issue of this kind the charge as a whole should be considered, as well as the evidence in the record.

ing the jury to find that he had the specific intent unlawfully to impair, obstruct, or impede the inquiry. Tr. at 3369. That instruction precluded any possibility of a conviction based on a mere negligent violation of section 1505, or one based on the supposition that defendant should have known but did not, in fact, know of the pendency of the inquiries. That conclusion is further buttressed by the fact that the evidence in the record amply, indeed conclusively, demonstrates that defendant knew of these inquiries.[71]

C. *"Due and Proper" Inquiry*

Defendant argues next that the existence of "due and proper" congressional inquiries was a question of fact for the jury rather than, as the Court ruled, a question of law. But it is clear, as a matter of the decisional law, that the issue whether a particular inquiry is a due and proper exercise of the congressional power of inquiry is a question of law (or of statutory construction), in that it requires a court to determine whether a particular congressional investigation is among the class of legislative activities protected by the statute.[72] *See United States* v. *Frucht-*

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[71] *See, e.g.*, contemporaneous memorandum from Sable to Poindexter discussing arrangements for North briefing of the congressional committee (Exh. 84); Pearson PROF note forwarded by Poindexter to North, stating that committee chairman Hamilton "will entertain motion soonest to report unfavorably on Resolution of Inquiry" (Exh. 89); *see also*, Gov. Exh. 104 and 129 which are to the same effect.

[72] Defendant's argument to the contrary is frivolous. It is his point that he "should have been allowed to present evidence on the issue [for a determination by the jury] whether the subject matter of the congressional inquiries properly came within the committees' concern." And he apparently

man, 421 F.2d 1019, 1021 (6th Cir. 1970) (existence of a "proceeding" under section 1505 is a question of law); *Rice* v. *United States*, 356 F.2d 709, 712-13 (8th Cir. 1966); *United States* v. *Batten*, 226 F. Supp. 492, 493-94 (D.D.C. 1964). *See also*, *Sinclair* v. *United States*, 279 U.S. 263, 298-99 (1929) (pertinency of questions posed by congressional committee issue of law); *United States* v. *White Horse*, 807 F.2d 1426, 1431 (8th Cir. 1986); *United States* v. *Johnson*, 718 F.2d 1317, 1323-24 (5th Cir. 1983). Defendant cites no decisions to the contrary.[73]

VII

Prejudicial Judicial Comments

Defendant's claim that the Court made prejudicial comments during the trial entirely lacks merit. Defendant relies in support of that claim on a few notorious cases from another litigation era in the District of Columbia when judges at time instructed juries, in almost so many words, to find criminal defendants guilty,[74] arguing that this case is just like

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expected to perform that task by evidence that a staff member believed that the House resolution of inquiry had a political purpose. Def. Reply Mem. at 39 n.17. *See* Section V, *supra*.

[73] *In re Winship*, 397 U.S. 358, 363 (1970), and its progeny hold only that a defendant may not be convicted unless the facts necessary to constitute the crime have been proved beyond a reasonable doubt. In the context of the issue here, that begs the question. It obviously does not follow from *Winship* that every question that may come up in the course of a trial is one of fact; some are, and others are questions of law.

[74] In *Billeci* v. *United States*, 184 F.2d 394, 400 (D.C. Cir. 1950), the judge stated to the jury that "[i]n a criminal

those. However, it is obvious from even the most cursory perusal of the law and the facts that that is not so.

It is firmly established law in the federal courts that the trial judge has the authority to comment on the evidence[75] and to question witnesses. *See, e.g., United States* v. *Liddy*, 509 F.2d 428, 438 (D.C. Cir. 1974); *United States* v. *Patterson*, 652 F.2d 1046, 1048 (D.C. Cir. 1981); *see also, Geders* v. *United States*, 425 U.S. 80, 86-87 (1976); *Glasser* v. *United States*, 315 U.S. 60, 82 (1942); *see also*, Fed. R. Evidence 614(b) (affirming the power of the Court to interrogate witnesses). That authority has been exercised by federal trial judges in thousands upon thousands of cases.

Our own Court of Appeals, like the other federal appellate courts, has stated that the trial judge not only may question witnesses because this is necessary to ensure that evidence is developed clearly and fully,[76] but that the judge may actually have an af-

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case the court cannot peremptorily instruct the jury to find the defendant guilty. If the law permitted it, I would do so in this case." Similarly, in *Blunt* v. *United States*, 244 F.2d 355, 362 (D.C. Cir. 1957), the court told the jury in a case involving the defense of insanity, that the criminal acts had been planned and that the defense psychiatric opinion was not based on fact. And in *United States* v. *Sullivan*, 178 F.2d 723, 724 (D.C. Cir. 1949), the judge instructed the jury that in his judgment the evidence constituted an intent to defraud. The cases cited in defendant's reply memorandum are of a similar vintage.

[75] *See, e.g., United States* v. *Jackson*, 627 F.2d 1198, 1206 (D.C. Cir. 1980).

[76] *See, e.g., Jackson*, 627 F.2d at 1206; *Liddy*, 509 F.2d 438; *Roberts* v. *United States*, 284 F.2d 109, 210 (D.C. Cir. 1960).

firmative duty to ask questions in order that the jury will have a proper understanding of the case.[77] As the Supreme Court held in the leading decision on this subject, "[i]n a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for purposes of assuring its proper conduct and determining questions of law." *Quercia* v. *United States*, 289 U.S. 466, 469 (1933).[78]

This does not mean, of course, that the judge may assume the role of advocate or otherwise generate prejudice by his questions or remarks. However, in theory a party could discern or claim prejudice with respect to any intervention by the trial judge, for any question asked or comment made could almost always be interpreted as being more helpful to one side than the other. For that reason, the law assesses prejudice more objectively on the basis of the record as a whole, taking into account such factors as the length and complexity of the trial, the conduct of counsel, and that of the witnesses.[79] *See*, *e.g.*,

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[77] *Patterson*, 652 F.2d at 1048; *Griffin* v. *United States*, 164 F.2d 903, 904 (D.C. Cir. 1947).

[78] *See also*, *Patterson*, 652 F.2d at 1048 ("A trial judge historically is not just an impartial umpire"); *Jackson*, 627 F.2d at 1206 ("A trial judge is not required to sit mute in the courtroom and merely wield his gavel as moderator"); *Liddy*, 509 F.2d 438 ("The precepts of a fair trial and judicial objectivity do not require a judge to be inert").

[79] Furthermore, not only is prejudice not presumed, *see*, *e.g.*, *Quercia*, 289 U.S. at 469, but it is not even determined by the mere fact that judicial comments may have some effect on the jury. *See United States* v. *Tello*, 707 F.2d 85, 90 (4th Cir. 1983); *United States* v. *Wilkins*, 422 F. Supp. 1371, 1375 (E.D. Pa. 1976), *aff'd*, 601 F.2d 577 (3rd Cir. 1979).

United States v. *Williams*, 809 F.2d 1072, 1088 (5th Cir. 1987);[80] *United States* v. *Twomey*, 806 F.2d 1136 (1st Cir. 1986); *United States* v. *Smith*, 561 F.2d 8, 14 (6th Cir. 1979).[81]

The trial record here reveals on the basis of criteria such as these that the questions asked were proper. The trial itself was complex legally, for in addition to issues involving the relatively complicated statutes governing the offenses defendant was alleged to have committed, there were difficult issues of immunity and taint under *Kastigar*; many problems relating to both witness testimony and document admissibility, and document redaction and paraphrasing, pursuant to the Classified Information Procedures Act (CIPA); and problems concerning the availability of executive and congressional privilege, among others. The trial was also of considerable complexity factually for several of the government's witnesses were aligned in interest with the defendant, some of them testifying only pursuant to a grant of immunity. In addition, there were congressional witnesses with their own interests to consider, as well as the unusual fact of the testimony of a former President. In these circumstances, intervention by the Court to keep the testimony focused on the issues and on admissible evidence, as well as to allow for their resolution without jury confusion, prejudice, or diversion into collateral byways, was occasionally re-

[80] In the eight-week *Williams* trial, the judge apparently interrupted defense counsel over 900 times (while interrupting government counsel significantly less). Nevertheless, the Court of Appeals affirmed, concluding that while the trial was not perfect, it was fair. 809 F.2d at 1086, 1097.

[81] There, the court posed approximately 250 questions to a defense witness; the conviction was upheld. 561 F.2d at 13-15.

quired. Even at that, as defendant concedes—as he must given the record—the Court's comments were isolated and infrequent. Def. Reply Mem. at 46.[82]

Defendant cites four questions[83] from a five-week trial[84] as having allegedly prejudiced the jury in favor of the conclusion that a conspiracy existed among various government officials including defendant. There are a number of reasons why these questions were neither improper nor prejudicial.

First, contrary to defendant's assertion,[85] the Court did not by these questions raise new and irrelevant subjects with the witnesses but merely pursued lines of inquiry already begun by counsel for one or both sides. These inquiries were also highly relevant; three of them concerned the intent of the alleged co-conspirator Oliver North,[86] and the fourth went to the

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[82] The Court of Appeals has stated that prejudice and reversible error may be found only where judicial comments or questions are pervasive and intrusive. *See, e.g., Jackson,* 627 F.2d at 1207; *Liddy,* 509 F.2d at 438-39.

[83] During the examination of Oliver North, a prosecution witness, the Court asked whether the witness saw a theme developing to come up with a false story so a Hawk missile shipment would not be revealed; whether North felt he had the authority to keep matters secret from the Congress and law enforcement officials; and whether North was not worried about deceiving the Congress. And during the testimony of former Attorney General Edwin Meese, the Court asked whether there had been a meeting when everyone was to testify to his own recollection. Tr. at 1206, 1570-72, 2554.

[84] With respect to the number of questions, *compare,* for example, notes 80 and 81.

[85] Def. Mem. at 67.

[86] That subject had actually been addressed by defense counsel in his cross-examination. Tr. at 1407, 1471.

basis of testimony that was to be given to Congress. And the questions to North, in particular, were asked to clarify confusing, discursive, and often non-responsive testimony from that reluctant witness. *See, e.g.*, Tr. at 1565-74.

Second, again contrary to defendant's assertions, the questions did not demonstrate any conclusion as to defendant's guilt or innocence; they principally dealt with the actions and purposes of the witnesses rather than those of the defendant.

The hollowness of defendant's claims is well captured by his reliance on the following colloquy:

> Q (by the prosecutor of the witness North): Does this now incidate to you that there seemed to be kind of a theme developing here in November of 1986 to come up with some false story to explain the Hawk missile shipment so this Finding will not be revealed, the politically embarrassing finding?
>
> Mr. Beckler (defense counsel): Objection, your honor.
>
> The Court: What is the matter with it? It sounds like a theme to me.
>
> Mr. Beckler: That is correct, it is a theme.
>
> That is a great argument, but this is not a proper question.
>
> The Court: Overruled

Tr. at 1206-07.

The Court's participation in this colloquy is characterized by defendant as "the most prejudicial comment" of all. Def. Mem. at 65. The Court has some

difficulty comprehending how the repetition of an expression that both the prosecution and the defense considered appropriate, made in the course of an attempt to decide on how to rule on a defense objection,[87] could reasonably be stigmatized as a prejudicial comment, let alone the most prejudicial comment of all.[88] The reference obviously was both proper and not prejudicial.

Third, counsel for defendant did not once object to any of the Court's questions they now claim to be highly prejudicial to their client, and on that basis alone they cannot for the first time object after the trial has been concluded. and demand a new trial on the basis of the objection. *See, e.g., United States* v. *Barbour*, 420 F.2d 1319, 1323 (D.C. Cir. 1969).[89]

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[87] Defendant's further argument that the Court by its question somehow confirmed "a crucial allegation of the prosecution's case" (Def. Mem. at 65), that is, the development of a cover story, followed directly on the heels of Oliver North's own testimony that a false cover story had been concocted. Tr. at 1204-06.

[88] Indeed, in view of the lack of merit to the complaint about this, "the most prejudicial comment" of all, it might not be unreasonable to reject out of hand the remainder of defendant's arguments on this issue. The Court has, however, reviewed the substance of the other claims of prejudice as well.

[89] The general rule that failure to object waives the objection is tempered by the plain error doctrine, Rule 52, Fed. R. Crim. P., which provides for review, notwithstanding the absence of a contemporaneous objection, if the error is "particularly egregious . . . seriously [affecting] the fairness, integrity or public reputation of the judicial proceeding." *United States* v. *Young, supra,* 470 U.S. at 15; *United States* v. *Frady*, 456 U.S. 152, 163 (1982). In this context, prejudice must be measured both by the effect of the matter on the trial

Fourth, again contrary to the defense's claim of prejudice, the fact is that the Court asked questions of witnesses for the government that were at least as difficult for them as those that were asked of defense witnesses,[90] and the questions therefore could

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as a whole and by the weight of evidence of defendant's guilt. *Young*, 470 U.S. at 19-20. *Compare* pp. 2-4, *supra*.

[90] Thus, during the examination of the FBI agent in charge of the early investigation of Admiral Poindexter, the following colloquy occurred:

> The Court: What was the purpose of the interview?
>
> The Witness: We were there conducting a criminal investigation. It was clear to me, anyway, that there were several issues that we wanted to learn information about and the FBI learns information by asking questions. It was a very normal thing for me to do, to—
>
> The Court: Well, it may be very normal thing to you, but I would still like to know for what purpose you interviewed Admiral Poindexter? Was he a suspect in any crime?
>
> The Witness: Because he was named as one of the people whose records that we were attempting to secure, and because of the press conference a few days earlier at which time it had been announced that Poindexter would retire, I think it was safe to say that we were looking at him as a potential suspect of our investigation.
>
> The Court: Did you advise him of his rights first?
>
> The Witness: No, I did not.
>
> The Court: Why didn't you do that if he was a suspect?
>
> The Witness: He was not in custody.
>
> The Court: Did you tell him what the interview was for?
>
> The Witness: Well, as background the Admiral and I had been acquainted on a prior occasion. I reintroduced myself, we had some casual conversation and I explained what the purpose of the interview was.

[Continued]

not have constituted an intimation to the jury on how it should decide.

Fifth, there were the Court's instructions to the jury. Far from being a "remote or obscure instruction," Def. Mem. at 64-65,[91] the Court went on at great length to charge the jury in as many different ways as it is possible to instruct a jury, that it was not to take its cue concerning facts or the defendant's guilt or innocence from the judge—not from his

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[90] [Continued]

The Court: That is what I just asked you. What did you tell him was the purpose of your interview?

The Witness: To paraphrase what I told him and based on what our mandate was, I told him we were investigating arms transactions involving Iran which could have resulted in diversion of funds to the Contras.

The Court: Did you ask or tell him what his participation of this investigation was, why you were questioning him?

The Witness: I questioned him to determine whether he had any knowledge of this.

The Court: Did you tell him why you were questioning him?

The Witness: I told him what our inquiry was.

The Court: Did you tell him why he was particularly being questioned. I know it is a great burden to have to answer these questions, but if you will bear with me or if you won't bear with me, you will have to answer them anyway.

The Witness: My best recollection is that I told him we were attempting to learn any information we could about the arms transactions and the possible diversion of funds to the Contras and—

Tr. at 1829-30, 1856, 1882-85.

[91] *See also*, Def. Reply Mem. at 47.

charge, not from his comments, not from his rulings, and not from his questions to witnesses.[92]

Accordingly, the Court rejects as entirely unfounded defendant's assertion that prejudicial comments by the Court entitle him to a new trial.

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[92] Defendant also complains about the Court's direction to Oliver North that since it had ruled that his testimony at his trial was the only credible testimony he was giving on the destruction of the Presidential Finding, he was to testify in accordance with that ruling. According to defendant, this direction amounted to an impermissible comment on North's credibility. Contrary to defendant's assertion, Def. Mem. at 69-70, the direction to the witness had nothing to do with the jury.

The subject arose as follows. As the prosecutor was questioning North about the Finding, the witness replied that Poindexter tore it in two. The prosecutor then asked whether North was certain that the Finding that was destroyed was the one with the politically embarrassing language. North thereupon turned to the Court, stating "I need help," and the Court in response advised the witness that he was to testify from his own knowledge. When North still seemed unsure, the prosecutor referred to the Court's pretrial ruling, and the Court advised the witness to testify consistently with the credible testimony he gave at his own trial rather than in accordance with his evidence at the *Kastigar* hearing. The Court's remark was thus a direction to the witness in direct answer to the witness' request; it did not, either in words or in purpose, instruct the jury to believe or to disbelieve the witness with respite to the substantive testimony he gave to it.

Aside from the merits, the irony inherent in defendant's complaint deserves brief notice. Having argued in essence that the Court improperly permitted the government to elicit testimony from North notwithstanding his alleged incapacity to tell the truth, *see* Part IV, *supra*, defendant on the issue now under consideration transforms himself into a champion of North's veracity whose credibility could not be commented on even if only indirectly and in response to his own question as to how he should proceed to testify.

VIII

Improper Closing Argument

Finally, defendant challenges statements made by the prosecutor in his closing argument which allegedly misstated the evidence, referred to facts not in evidence, and expressed personal opinions. Most of the statements being complained of were either entirely proper as based directly on the evidence or they represented paraphrases appropriate to proper advocacy. One or two comments expressing counsel's personal opinions may have been inappropriate, but under the circumstances they were not such as to call for a new trial.

A. *The Need to Show Prejudice*

Before considering the specifics of defendant's complaints, it is useful to consider the standard to be applied. The Supreme Court has ruled in a leading decision on this subject that, "[i]nappropriate prosecutorial comments, standing alone, would not justify a reviewing court to reverse a criminal conviction obtained in an otherwise fair proceeding. Instead . . . the remarks must be examined within the context of the trial to determine whether the prosecutor's behavior amounted to prejudicial error." *United States* v. *Young*, *supra*, 470 U.S. at 11-12. In this context, prejudice must be measured both by the effect of the comments on the trial as a whole and by the weight of evidence of defendant's guilt. *Id.* at 19-20. At bottom, the issue is whether the errors, if any, undermined the fairness of the trial and brought about a miscarriage of justice. *Id.*

In this case, the hurdle defendant must overcome is set even higher because he did not raise contem-

poraneous objections to any of the prosecutorial statements; he did not bring up the subject at the bench at the conclusion of the closing arguments; and he did not request a curative instruction. The law is that, except where the conduct is "particularly egregious . . . seriously [affecting] the fairness, integrity or public reputation of the judicial proceeding," *Young*, 470 U.S. at 15, the error is waived if it is not asserted in a timely manner. *United States* v. *Perholtz*, 842 F.2d 343, 352 (D.C. Cir. 1988). Just two weeks ago, the Court of Appeals again reminded the Bench and Bar that the plain error doctrine of Rule 52, Fed. R. Crim. P., "is to be 'used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result,' and only to correct 'particularly egregious errors.'" *United States* v. *John Doe*, —— F.2d —— (D.C. Cir. May 15, 1990), slip op. at 22. In other words, absent the most unusual circumstances, counsel for the defendant cannot remain silent, fail to interpose an objection, and then, after the verdict has been returned, seize for the first time on the point that the prosecutor's comments to the jury were improper and prejudicial. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-40 (1940).

Defendant has not even attempted to show specific prejudice; he has not argued in anything but the most conclusory fashion that the prosecutor's comments so undermined the fairness of the trial as to threaten a miscarriage of justice. *See United States* v. *Thomas*, 774 F.2d 807, 812 (7th Cir. 1985) (no reversible error where defendant fails to elaborate on how he was prejudiced by the prosecutor's conduct). It is with these general principles in mind that the Court now examines the alleged improprieties.

B. *Misstatements*

First. Defendant claims that the prosecution made several misstatements regarding the PROF system. One of these is said to have occurred when the prosecutor asked rhetorically in his summation whether defendant went into that system to find the memoranda which clearly showed what had happened, and that he did not do so because he knew what he would find. Tr. at 3319-20. Defendant suggests that since at the time no PROF notes were in his user area dating back to December 1985, the damaging notes were actually not available to him. That argument misses the point. There were notes showing defendant's contemporaneous knowledge of the November 1985 missile shipment in the National Security Council's PROF system, even if they were not in defendant's own user area (Exh. 35-37, 41). It was reasonable for the prosecution, as part of its summation, to ask the jury to infer that, as the Council's chief, the defendant had access to all the NSC computer files, including those that contained the relevant documents.[93]

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[93] Even less substantial is defendant's related attack on the prosecutor's argument that defendant knew that the PROF system operated in such a way that within seven to ten days even the backup tapes would be gone. That argument was squarely based on the government's cross-examination of Ed Barnes, a former NSC computer expert, who testified that Poindexter "was very aware of the back-up tapes." Upon being asked whether defendant had been informed that those tapes were being preserved, this colloquy ensued:

> A. Oh, he know that they were preserved. You mean longer than normal?
>
> Q. Longer the normal two-week period.
>
> A. No.

Tr. at 2980-81. The prosecutor's argument thus was directly based on the evidence and the reasonable inferences to be

Second. Defendant next contends that the prosecutor mischaracterized the so-called Monimbo [94] memorandum when he stated that Oliver North was giving military advice to the Contras with defendant's knowledge and support.[95]

The memorandum actually did propose various military options to prevent the ship's cargo from reaching the Sandinista government, and it was initialled and annotated by Poindexter. The prosecutor's comment was therefore true, except in two insignificant respects: the memorandum speaks of military assistance to the Contras instead of military advice—hardly a misstatement of consequence or detriment to defendant—and it discusses proposed rather than past action. But this, too, created neither substantial error nor prejudice because this particular memorandum was not the only evidence that North provided both military advice and military assistance to the Contras, and that Poindexter was fully aware of it.[96] At

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drawn therefrom. J. Moore, 8A Moore's Federal Practice ¶ 29.01.03[1].

[94] The "Monimbo" was a vessel which was intended to carry arms to the Sandinista government of Nicaragua.

[95] This argument was apparently made in response to a defense contention that Poindexter believed North's role to be strictly political and devoid of any military or tactical advice for the Contras.

[96] *See, e.g.*, Exh. 2 (November 7, 1984 memo from North to McFarlane, found in Poindexter's office (Tr. at 1825-26) that discusses North's meeting with Contra leader Calero to formulate plans for an attack against HIND helicopters and North's provision of intelligence and maps to the Contras to support the attack); Exh. 3 (December 4, 1984 memo from North, to McFarlane annotated and initialled by Poindexter,

worst, the prosecutor's comments may be regarded as slightly in error regarding the Monimbo memorandum itself but correct on the evidence in general.[97]

Third. The prosecutor's argument that defendant and North were running a private war in Nicaragua is characterized by defendant as "the grossest form of hyperbole." Def. Mem. at 76.

The evidence showed the following. North testified that Poindexter and McFarlane assigned him to replace the CIA's role in supporting the Contra's war efforts in Nicaragua (Tr. at 857-58); General Secord set up an operation under North's direction that supplied weapons to the Contras (Tr. at 868); over time, the operation replaced much of what the CIA had been doing (Tr. at 872); and on July 24, 1986, North reported to Poindexter that the total assets of his operation included six aircraft, warehouses, supplies, maintenance facilities, ships, boats, leased houses,

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that discusses hiring military trainers to assist the Contras in developing special operations expertise to destroy HIND helicopters); Exh. 145 A and B (May 1, 1985 memo from North to McFarlane, the original routing slip of which is initialled by Poindexter, that discusses future military operations of the Contras including an attack against Sandino airport, a major ground operation against a mine complex, and the opening of a southern front); Exh. 85 (describing need to turn the Enterprise's assets over to the North that he kept Poindexter appraised of his activities in support of the Contras).

[97] Further, the error was apparent from the face of the document that was available to the jurors for inspection and review. "Due respect must be accorded the jurors' common sense and discrimination." *United States* v. *Monaghan*, 741 F.2d 1434, 1441 (D.C. Cir. 1984).

vehicles, munitions, communications equipment, and a 6,520 foot runway—all valued at $4.5 million. Given this evidence, the prosecutor's comments were not improper.

Fourth. Defendant also maintains that the prosecutor misstated the testimony of President Reagan and of Rodney McDaniel. Again, there were no misstatements. According to defendant, the prosecutor was wrong when he argued in his summation that, when the former President was shown and read his own Presidential Finding, he stated that absolutely, it showed that "I traded arms for hostages." That argument was not inaccurate. When the former President was asked about the Finding, and more specifically whether he saw that, at least in that document, the Iranian initiative was directly linked as arms-for-hostages, he answered in the affirmative. Given that answer, the prosecutor's argument was fair.[98]

As for McDaniel, a National Security Council employee, the prosecutor quoted him as stating while on the stand that Poindexter had instructed him, "I know everything Ollie is doing, but you stay out of this." The actual McDaniel testimony, although not a verbatim version of the prosecutor's reference, was surprisingly close. When asked whether it was fair to state that "Poindexter told [him] he was aware of North's activities, and he did not think [McDaniel] needed to concern himself with that," the witness

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[98] Moreover, whatever the political effect on the former President, neither the question and answer nor the prosecutor's paraphrase suggested much of anything about defendant's guilt of the criminal charges.

answered, "Yes, that's fair." Tr. at 2858.[99] *See generally, Donnelly* v. *DeChristoforo*, 416 U.S. 637, 646-47 (1974); *United States* v. *Morris*, 568 F.2d 396, 401 (5th Cir. 1978).

C. *Expressions of Personal Opinion*

Defendant argues that the prosecutor expressed his personal opinion in his summation, in violation of the American Bar Association Standards for Criminal Justice 3-5.8(b).

One such incident cited in defendant's papers is the prosecutor's statement that "I would suggest to you that you could sit as jurors in a thousand cases and never find evidence more powerful and more convincing to show that the Defendant was guilty of the crimes that are set forth in this indictment." The comment was not proper.

In the first place, the use of the term "I would suggest" [100] is not generally regarded by the courts as

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[99] There is even less merit to two other claims of prejudice. The prosecutor incorrectly asserted that North and one Spitz Channel (another Iran-contra participant) set up the National Endowment for the Preservation of Liberty. In fact, Channel alone set up the organization. The difference is so trivial that defendant did not refer to the subject in his closing remarks, and he makes no effort now to show prejudice. In the same category is the prosecutor's remarks that "all" the diversion proceeds went to the Contras when, in fact, only a "large portion" went there. Tr. at 1102.

[100] As the government's memorandum points out, the personal pronoun "I" appears as frequently in the summation of defense counsel as in that of the prosecutor (Gov. Mem. at 71 n.34).

the equivalent of an expression of personal opinion.[101] Moreover, during summation, "the attorney is expected to perform as an advocate, and it is not improper for him to urge upon the jury that his side of the issue be found to have been established beyond question (though objectively might demand some less favorable conclusion). *United States* v. *Morris*, 568 F.2d 396, 401 (5th Cir. 1978).

Defendant similarly objects to the prosecutor's statement that he did not really know "what John Poindexter's defense is to the charges in this indictment," and that he "could only assume as a lawyer, a prosecutor in this case that the defense's strategy was to throw mud against the wall and see what sticks." Tr. at 3116. Reference to counsel's assumption "as a lawyer, a prosecutor in this case" may have been improper under the ABA standard. That said, the Court must consider whether the remarks substantially prejudiced the defendant. *Monaghan*, 741 F.2d at 1443; *Modica*, 663 F.2d at 1181.

As indicated at p. 5, *supra*, except for scattered attacks on the veracity of various witnesses and a more or less half-hearted effort to blame others who had responsibilities for various parts of the Iran-contra activities, no overall theory of defense was ever offered. While the reference to the prosecutor's

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[101] *See United States* v. *Stulga*, 584 F.2d 142, 147 (6th Cir. 1978) ("use of the words 'I submit' are not the equivalent of expressing a personal opinion"); *United States* v. *Modica*, 663 F.2d 1173, 1181 (2d Cir. 1981) (occasional use of rhetorical devices such as "I'm telling you" or "I suggest to you" is simply fair argument); *United States* v. *Murphy*, 374 F.2d 651, 655 (2d Cir. 1967); *United States* v. *Fike*, 538 F.2d 750, 758 (7th Cir. 1976).

individual belief may have been inapt, his comment that it was not known what Poindexter's defense was to the charges was not off the mark.[102]

Finally, defendant relies on opposing counsel's remarks concerning President Reagan, particularly the statement that the former President had lied when he denied the existence of an arms-for-hostages deal.[103] While the language regarding a former President of the United States should perhaps have been more delicate, the prosecutor's assertion was nevertheless a fair inference from the evidence. Nor was President Reagan's credibility on the issue irrelevant to the case, given the government's theory that one reason for defendant's participation in a cover-up was to protect the President from the political embarrassment of admitting an arms-for-hostages deal.

In short, the prosecutor's comments, in the context of the record as a whole, were either completely justified or they were not so prejudicial as to undermine the fairness of the trial. *See generally*, *Young*, 470 U.S. at 16; *Donnelly*, 416 U.S. at 640; *Socony-Vacuum*, 310 U.S. at 240; *Monaghan*, 741 F.2d at 1443. And any possible prejudice to defendant was cured by the Court's emphatic instruction that counsel's arguments are not evidence. Tr. at 3350. *See Perholtz*, 842 F.2d at 361, and cases cited.

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[102] Beyond that, the prosecutor's remarks indicated at most his belief that he had a strong case and defendant a weak one —a line of argument made every day in trials.

[103] Defendant also complains about the prosecutor's comment regarding Mr. Reagan's winking at the defendant. The former President's act arguably demonstrated bias and was therefore appropriate for notice in a summation.

IX

Conclusion

The Court has discussed the arguments presented in defendant's memoranda in substantial detail for two principal reasons: first, because counsel for defendant have made considerable, conscientious, and well-documented efforts in raising and supporting a number of claims of fact and law, and they are on that basis alone entitled to thorough consideration of the issues which have thus been brought to the fore; and second, because this is a case which, on account of its subject matter, deserves full exploration and explanation by the Court at every stage of the proceedings. However, the detailed discussion herein should not be taken as an indication that in the Court's view the arguments advanced by defendant have, in the end, significant substantive merit; many of them, ingenious though they be, represent rather desperate attempts to cobble together some sort of peg on which to hang the present motions.

The Court concludes that the evidence more than adequately supports the jury's determination of defendant's guilt of the charges. There is no warrant for a judgment of acquittal or for a new trial in the interest of justice, and the motions are therefore denied.

/s/ Harold H. Greene
HAROLD H. GREENE
United States District Judge

May 29, 1990.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 88-0080-01
(HHG)

UNITED STATES OF AMERICA

v.

JOHN M. POINDEXTER

MEMORANDUM

[Filed Mar. —, 1990]

In two separate motions, defendant has requested the Court to prohibit the government (1) from eliciting any testimony from Oliver North that overlaps with testimony North provided at his own trial, the claim being that the government knows or has reason to know that this testimony will be false; and (2) from eliciting testimony from North on several specific subjects (the principal one relating to the existence and destruction of a presidential Finding), on the basis that such testimony would violate the defendant's right against self-incrimination under the *Kastigar* doctrine. The Court disposes of both motions here, following briefing on each motion and oral argument on March 7, 1990 on the latter one.

I

According to defendant, since government counsel argued in their summation in the *North* trial that Oliver North had perjured himself on many aspects of his own trial,[1] the prosecution knows or has reason to believe that North will perjure himself again or at least mislead the jury when called to testify in this trial. Defendant's Motion at 3-4; Reply at 3-4. It follows, according to defendant, that his due process right to a fair trial can be secured only by an order prohibiting the government from eliciting any testimony from Oliver North which would overlap with the testimony he provided during his own trial. Motion at 1; Reply at 2. The government has responded that the testimony it intends to elicit from North in this case will not include any of the topics as to which North perjured himself. Opposition at 3-4.

Given North's close relationship to Admiral Poindexter,[2] it is unclear precisely what will be forth-

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[1] The prosecution also attacked North's testimony as false on other occasions.

[2] In addition to working with him at the National Security Council, North expressed the unique relationship he had with Admiral Poindexter when he said at the pretrial *Kastigar* hearing in this Court that Poindexter was the only one who "didn't hang Ollie North out to dry." December 13, 1989 Tr. at 418. It may also be relevant that North has already been sentenced and therefore has little to gain from cooperating with the government at defendant's expense. Given these facts, if North has any motive to mislead the jury, it would be more likely to the benefit of the defendant than to that of the government.

coming in his testimony.[3] However, certain principles and procedures applicable here for handling potentially false or misleading testimony have been established by the precedents. The government clearly has a duty to refrain from eliciting and relying upon testimony known to be perjurious. *Napue* v. *Illinois*, 360 U.S. 264, 269 (1959); *Mooney* v. *Holohan*, 294 U.S. 103 (1934); *United States* v. *Gaggi*, 811 F.2d 47, 59-60 (2d Cir. 1987). However, given that government counsel have stated that they are conscious of this duty, and that they do not intend to elicit any testimony which they know or have reason to know to be false, a court order to the same effect may well be unnecessary.[4]

In any event, the cases cited by defendant in which the courts have addressed the issue of prosecutorial use of perjured or otherwise false testimony have all involved the actual use by the government of specific perjurious testimony. *See Giglio* v. *United States*, 405 U.S. 150 (1972) (false statement regarding government's promise of leniency for witness in return for his testimony); *Napue* v. *Illinois*, *supra* (false statement regarding the consideration witness would receive for testifying); *Miller* v. *Pate*, 386 U.S. 1 (1966) (false statement regarding the source of the stain on a pair of shorts which allegedly belonged

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[3] The prosecution need not refrain from calling a witness merely because his testimony cannot be ascertained with certainty. *See Delaware* v. *Fensterer*, 474 U.S. 15, 22 (1985).

[4] The prosecution also has a duty to correct testimony elicited from a government witness which it knows to be false or is so misleading as to jeopardize the fair trial of the defendant. *United States* v. *Iverson*, 637 F.2d 799 (D.C. Cir. 1980). *Napue* v. *Illinois*, *id.*

to the defendant); *Alcorta* v. *Texas*, 355 U.S. 28 (1957) (false statement regarding the witness' degree of intimacy with the defendants' wife); *United States* v. *Iverson, supra*, 637 F.2d at 808 (false statement regarding witness' sentencing status).

None of the precedents stands for the proposition that the prosecution may not call a witness merely because it has reason to believe that he has previously perjured himself in a general way or on a matter with respect to which he will not be asked to testify at a forthcoming trial. If what defendant advocates were the governing rule, the government would be prohibited from ever calling as a witness any co-conspirator or former co-defendant who may have provided false evidence prior to his cooperation with the government. That, patently, is not the law.

To the contrary; the prosecution need not refrain from calling a witness to testify simply because his character for truthfulness may be subject to attack. *See* Fed. R. Evid. 608. In such a situation, the criminal justice system relies upon the on adversarial process to elicit the truth, including a full and fair cross-examination of the witness, rather than upon the exclusion of the testimony.

In short, the courts have adopted a rule prohibiting actions by the government, amounting in a sense to prosecutorial misconduct, to secure a conviction through the use of specific perjured testimony. However, defendant's effort to convert this salutary rule into a general prohibition on the use by the government of an individual who may have lied on other matters for his own self-interest or otherwise must fail. The motion will therefore be denied.

II

In his second motion, defendant argues that his right against self-incrimination under the *Kastigar* doctrine will be violated if the government is permitted to elicit testimony from North regarding four areas: (1) North's conversations with Poindexter prior to the August 6, 1986 meeting with HPSCI, a congressional committee; (2) the existence of a 1985 Presidential Finding; (3) the alleged destruction of that Finding; and (4) the reason for the destructionl. According to defendant, North is incapable of testifying on each of these areas without reliance on Poindexter's immunized testimony. The Court concludes that this analysis is flawed.

1. Defendant asserts that North's trial testimony regarding his discussions with Poindexter prior to his meeting with the congressional committee is directly derived from the Poindexter immunized testimony. But the fact is that the Poindexter testimony on this issue was quite limited.[5] By contrast, North's own testimony, both at his trial and at the Kastigar hearing before this Court, provided a wealth of detail, and on some points those details differed from the testi-

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[5] In his immunized testimony, Poindexter very briefly mentioned that after talking with Charmain Hamilton about the arrangements for North's meeting with HPSCI, he asked North if North could meet with the committee, and that North "said that he could, and he could handle it." *Testimony of Admiral Poindexter* at 104. This appears to be the extent of Poindexter's testimony with respect to meetings with North prior to the August 6, 1986 meeting. Indeed POindexter even stated that he did not know whether North was the NSC staff officer assigned to draft answers to the congressional inquiries on House Resolution 485, *id.* at 102.

mony given by Poindexter.[6] Thus, by the standards established by the Court's January 4, 1990 Memorandum and those of common sense, it cannot be said that the North testimony was derived from the Poindexter immunized testimony; it clearly had its own independent basis.[7]

2. At his own congressional testimony, given before Poindexter appeared before the Congress, North testified to the existence of the 1985 signed Presidential Finding concerning arms sales to Iran. In fact, defendant recognizes, as he must, that North informed the committees that he believed he had seen a signed copy of the Finding in Poindexter's office in early December 1985,[8] and that he subsequently stated in his own trial that he had seen the signed Finding several times.[9] On this basis, any North testimony

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[6] For example, North testified to a discussion with Poindexter regarding the assignment of this responsibility and the apporach he would take, as distinguished from that of one Ron Sable, to whom the matter had been assigned; that Poindexter instructed him to meet with the committee "on our turf;" that North recommended that the meeting would not be a good idea because the committee might aske about matters North could not reveal; and that Poindexter suggested to him that the purpose of the meeting was to stop the congressional inquiry.

[7] Of course, North was also a direct participant in the events.

[8] Defendant's Memorandum at 9, citing Testimony of Oliver North, Joint Hearings Before the House Select Committee to INvestigate Covert Arms Transactions with Iran and the Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition, 100th Cong., 1st Sess., Vol. 100-7 Pt. I (Committee Hearing) at 33-34.

[9] North trial transcript at 7612.

concerning the existence of the Finding could not be held to be dependent upon the Poindexter congressional testimony.

3. What is at issue with respect to the destruction of the Presidential Finding is whether, as defendant contends, "the only predicate" for the inquiry is his own immunized testimony, Memorandum at 4, or whether the government could establish the relevant facts independently of that testimony, on the other. Here again, the resolution of the issue is not in substantial doubt.

When North was asked at his own trial about the time when he had learned that Poindexter had destroyed the Finding, he answered unequivocally, "I was there." In response to a follow-up question regarding a statement he had previously made to the effect that he had only been told that Poindexter had destroyed the document, he said, "Well, I saw the finding torn up. I don't know what—As I said the pieces of it I don't know where it went, but I saw him tear it in two." Tr. of North trial at 7612-13. When pressed by the Court where he was when the finding was destroyed, North answered, "In Admiral Poindexter's office." Id. at 7615.

The principal basis for defendant's expression of doubt concerning this unequivocal testimony is that North "reluctantly" testified at the *Kastigar* hearing held in this Court on December 13, 1989, that his trial testimony on this issue was affected by Poindexter's immunized testimony. Memorandum at 12. To be sure, North did testify to that effect at the December 13, 1989 hearing, but that testimony can hardly be characterized as reluctant. As the Court indicated in reviewing the testimony provided at that hearing,

North appears to have been embarked at that time upon the calculated course of attempting to assist his former colleague and co-defendant, the only one who "didn't hang Ollie North out to dry," by prevaricating on various issues, including most notably on the issue whether he had to rely for his recollection of events on Poindexter's immunized testimony.[10] His insistence on having been heavily influenced by that testimony was enthusiastic rather than reluctant. December 19, 1989 Opinion at 33-34. See also, note 2 *supra*.

At this hearing, North repeatedly claimed that he could not distinguish between his own observations and the version of events described in another's testimony; yet, as the Court has stated, it is unlikely that a witness who was a participant in the events as they occurred, could not make such a distinction. Opinion at 34. Nevertheless, the Court was prepared, as a general proposition, to accept North's assertion, dubious as it was, on the theory that it could not "take independent evidence of the North thought processes." *Id.* However, on the particular issue under consideration here, North has provided the Court with just such independent evidence by way of his own trial testimony. The Court finds that, for the purposes of resolution of the present issue, and upon consideration of the usual tests for credibility, North told the truth at his trial rather than at the December 13, 1989 hearing.

Defendant argues that, irrespective of that conclusion, the Court may not go behind the most recent North testimony because it had previously indicated

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[10] North knows, of course, from his own trial, that under *Kastigar* evidence that is influenced, or tainted, by immunized testimony must be excluded.

that the government could elicite testimony from North only with respect to certain specific areas, and that the issues now before the Court do not fit the description then given. That argument, too, must be rejected.

The conditions specified in the Court's December 19, 1989 and the January 4, 1990 Opinions, were designed to prevent the use at defendant's trial of evidence derived from his own immunized testimony.[11] However, it could hardly be maintained that the testimony of a witness who was physically present and personally observed an event which undoubtedly took place must be regarded as derived instead from defendant's immunized testimony. Whatever one may be able to say regarding the source of derivation of evidence concerning conversations, routine memoranda, hearsay, or other events with respect to which a witness could not be precisely certain, the Court rejects as totally incredible the suggestion that an eyewitness to the almost ceremonial destruction of a state paper such as a signed Presidential Finding would not know that he had been such an eyewitness

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[11] Furthermore, the North testimony was significantly more detailed than that of the Poindexter, and it fit the conditions of December 19 and January 4 in that and several other respects. For example, when asked whether or not North was in the room when he destroyed the finding, Poindexter said, in his immunized testimony, "I can't recall . . . I believe that Colonel North was there in the office, but I am a little fuzzy on that point." *Testimony of Admiral Poindexter*, Committee Hearings, Vol., 100-8 at 20. Since North subsequently testified that he was indeed there and witnessed the destruction of the document, his trial testimony is more expansive than Poindexter's immunized testimony, and thus further indicates an independent basis of knowledge. *See* January 4, 1990 Memorandum at 4 and n.2.

(with only one or two others), as well as the claim that he could not testify with respect thereto even though he himself had previously already testified to the occurrence of and his presence at the event. The North sworn statements regarding his observation of the destruction of the finding by Poindexter, assuming that they are repeated at the trial here,[12] would not be derived from that immunized testimony; they would be derived from the evidence of North's own senses.[13]

4. Contrary to defendant's assertion that North provided no reason for the destruction of the Finding in his own congressional testimony, Memorandum at 13, in fact North testified on that occasion that he was

> . . . concerned that there may well have been in that transaction such a clear indication that the original decision had been based solely on arms for hostages, that is could in turn mean enormous international embarrassment to the administration and the President and could well work a domestic disaster, as we now see before us.[14]

Beyond that, defendant relies upon the proposition that North's testimony itself was derived from the

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[12] Since North has changed his testimony several times, a further recantation can obviously not be excluded.

[13] However, the Court rejects the government's additional and alternative contention that, in any event, the Poindexter testimony with respect to the destruction of the Finding is not protected because it was not compelled but volunteered. See *Zicarelli v. New Jersey*, 406 U.S. 472 (1972). In view of the scope of the committees' inquiry and the atmosphere there prevailing, it cannot be said that these Poindexter statements were volunteered.

[14] Committee Hearing at 32.

Poindexter congressional testimony because allegedly "North did not know whether the Finding had been signed or destroyed, so he clearly would not know why the Finding had been destroyed." Memorandum at 14. Since, as discussed above, the premise of that argument is in error, so is the argument itself.

Finally, in the context of discussing the false chronology he prepared North identified political embarrassment as the problem with disclosure of the November 1985 Hawk missile shipment, stating that this disclosure could indicate "that the original decision had been based solely on arms for hostages," and could therefore result in "enormous international embarrassment to the administration and the President and could well work a domestic disaster." *Testimony of Oliver North, id.* at 32. Given that the substance of the 1985 Finding had to do with the Hawk missile shipment, it is clear that North was aware of the consequences of disclosing the Finding long before he he heard Poindexter's testimony.

North's involvement in constructing the chronology together with the role of the Finding in that chronology also exposed him to conversations with others about the consequences of this disclosure, and he testified in detail at his own trial about these conversations and other matters he had been told about the disclosure. *See* North trial transcript at 7596-7601, 7604, 7606-7612. North described himself as "the person who is trying to put all this together, put the best possible light on it . . . explain it to a variety of people who are putting in input from all over the place and I'm told you can't talk about the '85 Finding, you can't reveal that to the Congress . . ." *Id.* at 7611. This central role, together with the detail

North has provided about these events in his congressional testimony and at his own trial indicates that he has an independent basis of knowledge for testifying about the existence of the 1985 Finding, as well as possible reasons for its destruction.

For the reasons stated, it is this 8th day of March, 1990

ORDERED that defendant's motion to prohibit the government from eliciting any testimony from North which he provided at his own trial, be and it is hereby denied; and it is further

ORDERED that defendant's motion *in limine* to prohibit the government from eliciting testimony from North with respect to the existence of the 1985 Finding, its destruction, the reasons for its destruction, and the meetings between North and Poindexter prior to the August 6, 1986 HPSCI meeting, be and it is hereby denied.

/s/ Harold H. Greene
HAROLD H. GREENE
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Criminal Nofl 88-0080-01
(HHG)

UNITED STATES OF AMERICA

v.

JOHN M. POINDEXTER

OPINION

[Filed Dec. 19, 1989]

The issue before the Court is whether it should dismiss the indictment on account of what defendant claims to be the government's failure to comply with the requirements of *United States* v. *Kastigar*, 406 U.S. 441 (1972).

I

Factual Background

In the spring of 1987, defendant was subpoenaed to testify and to provide documents to the congressional committees investigating the so-called Iran-contra affair. Prior to that time, the Office of Independent Counsel had convened a grand jury which was investigating the same subject in a criminal context. When called by the congressional bodies, de-

fendant asserted his Fifth Amendment privilege against self-incrimination. Upon application by the congressional committees, the District Court issued orders compelling defendant to testify, at the same time granting him what is called "use immunity" with respect to that testimony. 18 U.S.C. § 6002. In compliance with these orders, defendant testified for several days before the committees in executive session and for several more days in public. The public sessions were widely broadcast and televised, and they were the subject of extensive coverage in the print media.

Following his indictment here, defendant, together with two of his co-defendants who had also received immunity—Oliver North and Albert Hakim—requested that Judge Gesell of this Court, who was then presiding over all the Iran-contra cases, dismiss the indictment pursuant to *United States* v. *Kastigar*, 406 U.S. 441 (1972). Ultimately, as discussed below, that request was denied, and it has now been renewed to this Court.

In *Kastigar*, the Supreme Court was faced with the issue whether an individual may be compelled over his objection to give testimony, consistently with the Fifth Amendment's privilege against self-incrimination, when the government provides him with use immunity pursuant to 18 U.S.C. § 6002. The Court answered that question in the affirmative, but in so doing it held that, to be effective, the immunity grant must prohibit the prosecutorial authorities from using the compelled testimony in any respect. In that vein, the Court ruled that the prohibition on use includes use of the compelled testimony as an investigatory lead and of evidence obtained by focusing investigation on the immunized witness as a re-

sult of compelled disclosures. However, said the Supreme Court, neither the Fifth Amendment nor the immunity statute precludes the government from prosecuting such a witness by the use of evidence from independent sources.

When the *Kastigar* issue was first raised before Judge Gesell by the defendants, including Poindexter, he held an evidentiary hearing, at which Lawrence Walsh, the Independent Counsel appointed with respect to these cases, testified regarding the precautions he had taken to prevent exposure of the attorneys on his staff to the congressional testimony of Poindexter, North, and Hakim—the three Iran-contra defendants who had been granted immunity.[1] Judge

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[1] Judge Gesell summarized these precautions as follows:

> Prosecuting personnel were sealed off from exposure to the immunized testimony itself and publicity concerning it. Daily newspaper clippings and transcripts of testimony before the Select Committees were redacted by nonprosecuting "tainted" personnel to avoid direct and explicit references to immunized testimony. Prosecutors, and those immediately associated with them, were confined to reading these redacted materials. In addition, they were instructed to shut off television or radio broadcasts that even approached discussion of the immunized testimony. A conscientious effort to comply with these instructions was made and they were apparently quite successful. In order to monitor the matter, all inadvertent exposures were to be reported for review of their possible significance by an attorney . . . who played no other role in the prosecution after the immunized testimony started . . . Overall the file reflects a scrupulous awareness of the strictures against exposure and a conscientious attempt to avoid even the most remote possibility of taint.

United States v. *Poindexter*, 698 F. Supp. 300, 312-13 (D.D.C. 1988).

Gesell also reviewed the entire transcript of the grand jury proceedings that led to the indictment of these persons in order to determine whether impermissible use had been made of the immunized testimony by and before that body; he reviewed related documents; and he ordered a severance of the defendants based in part on the possibility that a defendant might want to make use at trial of the immunized testimony of a co-defendant. On June 16, 1988, the Judge issued a thoughtful and comprehensive Opinion, detailed findings, and an order that denied defendants' motion to dismiss on *Kastigar* grounds. *United States* v. *Poindexter*, 698 F. Supp. 300 (D.D.C. 1988).[2]

On August 25, 1989, defendant Poindexter filed with this Court a "Renewed Motion to Dismiss" on *Kastigar* grounds. After briefing by both parties of the issue, and after hearing legal argument, this Court ordered that two evidentiary hearings be held. At one of these, testimony was taken from the two members of the Independent Counsel's professional staff who had not been exposed to the early prophylactic measures adopted by the Independent Counsel, and at the other, testimony was heard from five prospective trial witnesses.[3] *See* Parts IV and V, *infra*. The motion is now ripe for decision.

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[2] Following the conclusion of the trial of Oliver North, Judge Gesell again denied a *Kastigar* motion to dismiss filed by that defendant.

[3] In advance of these hearings, the Court also approved subpoenas issued by the defense for various documents in the possession of the Independent Counsel bearing upon possible taint from the immunized testimony.

II

Legal Principles

As will be seen below, the decisions which have interpreted and applied *Kastigar* are by no means unanimous in their approach to the immunity problem. In that circumstance, to the extent that this Court is not bound by precedent (*i.e.*, decisions from the Court of Appeals for this Circuit), it is useful to consider general jurisprudential principles as guideposts for decision.

What is most basically at stake here is the defendant's right under the Fifth Amendment not to be required to incriminate himself, that is, not to testify at all. This means, of course, that when he is compelled, following the grant of use immunity, to testify against his will, the immunity must be broad enough to make him whole—to place him in the same position as if he had never testified. The practical effect of such an assumption is that any subsequent criminal prosecution must proceed without evidence that is based on testimony defendant gave pursuant to the compulsion the immunity grant provided. In furtherance of this principle, the courts have held that the evidence at a subsequent criminal trial must be untainted by the immunized testimony, it must be independent of that testimony, or both.

It is also clear, however, that, as is so frequently true in the law, care must be taken that a doctrine designed as a shield is not transformed into a sword. As applied to the situation here, this means that the defendant is entitled only to be free from being confronted at a criminal trial with evidence which stems, in one form or another, from the testimony

he gave at the immunity proceeding, here the congressional hearing. The defendant is not entitled, however, to be free from any and all prosecutions relating to the subject matter of his immunized testimony, even those which are untainted by that immunized testimony and are independent of it. Such complete immunity, generally called transactional immunity, is not available to the defendant here: it was never granted to him.[4]

III

Test Applied by the Court

With this background, it now becomes appropriate to delineate the test the Court is applying pursuant to the decided cases with respect to the government's burden to demonstrate the absence of taint from the immunized testimony, and its corollary, the existence of independent knowledge by witnesses for the government. The *Kastigar* Opinion states that use immunity "prevents the prosecutorial authorities from using the compelled testimony in any respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness." 406 U.S. 453.

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[4] Although the two types of immunity are identified by different terminology, the distinctions between them are not as clear-cut as the terminology suggests. As will be seen below, if "use immunity" is defined expansively enough, it becomes, in effect, transactional immunity. Furthermore, the appellate courts differ as to the extent of use immunity. To cite just one example—some courts define the concept as reaching only to a prohibition on the use by the prosecution of the actual evidence the defendant gave at the immunized proceeding; others have announced that non-evidentiary uses (*e.g.*, exposure to immunized testimony aiding the prosecutor in cross examination of defendant) are also prohibited.

Based on this *Kastigar* language, defendant argues that dismissal is here required as a matter of law because the government "faces the impossible prospect of tracing all of the evidence accumulated during the course of the investigation and used as investigatory leads to sources wholly independent of the immunized testimony. Each step of the investigative chain by which the evidence presented was obtained must be documented or accounted for."[5] Defendant goes on to claim that, if the Court chooses not to dismiss the indictment outright, the government must "at the very least, call each witness, all grand jury and trial witnesses, all grand jurors, and each member of the prosecution staff who has assisted in this case."[6] As counsel has explained several times at oral argument, in defendant's view the government must, in essence, prove a negative: that, whatever instruction may have been given to grand jurors or witnesses, or whatever the evidence may indicate with respect to the independence of a witness' testimony in relation to Poindexter's immunized testimony in Congress, the government must demonstrate affirmatively that the immunized testimony did not, somehow, in some way, come to the attention of the witnesses, prosecuting attorneys, or grand jurors, and had an influence on their thinking, even one for which they cannot at this time consciously account.

The Court rejects this absolutist approach. There is no question but that language can be found in a few isolated decisions, particularly in *United States v. McDaniel*, 482 F.2d 305 (8th Cir. 1973), to sup-

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[5] Renewed Motion to Dismiss at 40.

[6] *Id.* at 3.

port defendant's position.[7] However, with respect to its broad language, *McDaniel* stands alone. Even the Eighth Circuit has since 1973 abandoned the *McDaniel* standard.[8] Similarly, the other Courts of Appeals have criticized *McDaniel* and have refused to follow it. Typical in that regard is the recent decision of the First Circuit in *United States* v. *Serrano*, 870 F.2d 1, 17-18 (1st Cir. 1989). There, the Court stated flatly that it "disagree[d] with the Eighth Circuit's statement in *McDaniel*, 482 F.2d 311, that, where the prosecutor has been exposed to the immunized testimony, 'the government is con-

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[7] In that case, the court said that the government is precluded from all use of the immunized testimony, including such non-evidentiary use as "assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy." 482 F.2d at 311.

[8] See *United States* v. *Barker*, 542 F.2d 479, 484 n.9 (8th Cir. 1976), holding that the "extraordinary" *McDaniel* burden was appropriate there only because the prosecution in that case had thoroughly immersed itself in the immunized testimony at the outset of the case; and *United States* v. *Garret*, 849 F.2d 114 (8th Cir. 1988), which armed a conviction even though the defendant had given his immunized testimony before the same grand jury that subsequently indicted him. Such a result would not have been possible had the Court of Appeals in 1988 adhered to the language of the 1973 decision.

The *McDaniel* result is explainable only by its peculiar facts: the knowledge law enforcement had of the defendant's immunized testimony was extraordinarily extensive; the United States Attorney "had read the three-volume transcript of McDaniel's [immunized] testimony;" and, as indicated, the indicting grand jury and the grand jury that took the immunized testimony were the same body. 482 F.2d at 309.

fronted with an insurmountable task of discharging the heavy burden' of proving no nonevidentiary use," and it suggested that the McDaniel approach "amounts to a per se rule that would in effect grant a defendant transactional immunity," 870 F.2d at 17, in contravention of *Kastigar*.

A number of recent decisions which have discussed the *Kastigar* rule in detail mandate application of the rule in a manner that falls short of the broad view espoused by the defendant. Most important for present purposes is the decision of the Court of Appeals for this Circuit in *Rinaldi* v. *United States*, 808 F.2d 1579 (D.C. Cir. 1987). The court made it clear in that case that where a witness is approached and developed independently of the immunized testimony, or where the law enforcement authorities would have inevitably learned from that independent witness the information that was to be the subject of his trial testimony, no breach of use immunity occurs even if the witness was exposed to the immunized statements. 808 F.2d at 1583. The court further concluded that, if the trial judge could properly find as a fact that a non-immunized witness would inevitably have led the government to yet another witness, the second witness could testify at trial even though he was also identified through immunized statements. Finally, where it appears that the government contacted a witness prior to the grant of immunity, that witness may testify as to what he knows, unless his testimony was influenced by immunized statements that are not "essentially irrelevant to the government's case." 808 F.2d at 1584. Other Circuits are in agreement with the *Rinaldi* rulings or they further expand upon them, as indi-

cated below. Accordingly, the following principles may be distilled from the appellate rulings.

The Court must satisfy itself, and it must be able to find as a fact, that prophylactic measures were taken which, as a practical matter, as distinguished from absolute theoretical certainty, ensure that the evidence to be used at trial was untainted. *See United States* v. *Byrd*, 765 F.2d 1524, 1528-32 (11th Cir. 1985). If in spite of proper precautions, there is some evidence of taint, the indictment will not be dismissed if the untainted evidence is beyond a reasonable doubt substantial. *Serrano*, 870 F.2d at 15-16; *Byrd*, 765 F.2d at 1530-31 & n.8; *United States* v. *Gregory*, 730 F.2d 692, 698 (11th Cir. 1984). Moreover, even if the evidence of taint is substantial, the validity of the indictment and of any conviction secured thereunder will still be sustained if the evidence provided by the government's witnesses was derived independently of the immunized testimony. *See Rinaldi*, 808 F.2d at 1583; *Byrd, supra; United States* v. *Dynalectric Co.*, 859 F.2d 1559, 1578-80 (11th Cir. 1988); *see also, Kastigar*, 406 U.S. 461 (Fifth Amendment allows prosecutions using evidence from legitimate independent sources).

The Court will now discuss the specific issues presented by the defendant's motion under three headings: (1) grand jurors and grand jury witnesses; (2) prosecuting attorneys; and (3) trial witnesses.

III

Grand Jurors and Grand Jury Witnesses

The issues relating to grand jurors and grand jury witnesses were resolved by rulings made by Judge

Gesell following an exhaustive factual inquiry" when the instant case was still pending before him. Judge Gesell held that the immunized testimony of defendant was not submitted to the grand jury in any form; that this testimony played no part in the grand jury's unanimous decision to indict; and that none of the testimony or exhibits presented to the grand jury became known to the prosecuting attorneys either from the immunized testimony itself or from leads derived from that testimony, directly or indirectly. 698 F. Supp. at 314-15.

These holdings are the law of the case, and on that basis they are subject to reexamination at a later stage of the same litigation only for exceptional reasons. *International Union, UAW* v. *Donovan*, 756 F.2d 162, 165 (D.C. Cir. 1988); *Laffey* v. *Northwest Airlines, Inc.*, 740 F.2d 1071, 1082-83 (D.C. Cir. 1984). Not only are there no exceptional reasons for reversing Judge Gesell's holdings; this Court concludes upon its own examination of the facts and the issues that these holdings are clearly correct.

Not a single decision by any court has been cited by defendant or found by the Court holding that an indictment should be dismissed on account of possible grand jury taint in circumstances such as these,[10] or

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[9] *See* pp. 3-5, *supra*. Although counsel for the parties briefed and presented oral argument on the grand jury issues, the dictates of grand jury secrecy and other principles (*e.g.*, increase in pretrial publicity resulting from a broad pretrial *Kastigar* hearing, the spreading of taint from the immunized testimony, the grant of the broadest kind of discovery to defendant contrary to normal practice) prevented their examination of grand jurors and grand jury witnesses.

[10] The cases cited by defendant in which indictments have been dismissed as a result of grand jury taint involved far

that the defendant is entitled, notwithstanding grand jury secrecy guaranteed by Rule 6, Fed. R. Crim. P., to question "all the grand jurors,"[11] or any of them. Indeed, under the rule of *United States* v. *Calandra*, 414 U.S. 338, 345 (1974), even if the grand jury had been exposed to evidence secured in violation of a defendant's Fifth Amendment rights, the indictment would not thereby be invalidated. *See also*, *Midland Asphalt Corp.* v. *United States*, 109 S. Ct. 1494 (1989); *Costello* v. *United States*, 350 U.S. 359, 363 (1956); *United States* v. *Blue*, 384 U.S. 251, 255 n.3 (1966); *United States* v. *Henderson*, 406 F. Supp. 417, 422 (D. Del. 1975) (immunized testimony). It may be that, where there are indications of extraordinary and widespread taint, even the statutory and traditional grand jury secrecy could be invaded, but this is clearly not such a case.

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more extensive taint than is even alleged by defendant to have occurred here. *See United States* v. *Anzalone*, 555 F.2d 317 (2d Cir. 1988); *United States* v. *Hinton*, 543 F.2d 1002 (2d Cir. 1976); *United States* v. *Tormas-Vega*, 656 F. Supp. 1525 (D.P.R. 1987), *aff'd mem.*, 843 F.2d 1384 (1st Cir. 1988); *United States* v. *Cortese*, 568 F. Supp. 119 (M.D. Pa. 1983). In *Hinton* and *Anzalone*, the same grand juries that heard defendant's immunized testimony subsequently indicted him. *Anzalone*, 555 F. Supp. at 318-19; *Hinton*, 543 F. Supp. at 1008-09. In *Cortese*, the government read the defendant's immunized testimony to the grand jury. 568 F. Supp. at 130. In *Tormas-Vega*, an investigator and a prosecutor watched the defendant testify under immunity on television, and the investigator then testified before the grand jury on specific matters that the government admitted had been first mentioned in the immunized testimony. 656 F. Supp. at 1526-29. No circumstances even remotely resembling these are present here.

[11] Defendant's Memorandum at 11.

The grand jurors were instructed several times in emphatic terms and in detail before Poindexter (or any other immunized witness) testified in Congress that they were not to read, listen to, or otherwise pay any attention to testimony at those hearings. 698 F. Supp. at 309-11.[12] There is nothing in the grand jury record to indicate that the grand jurors did not comply with these continuing admonitions.[13] Moreover, much of the grand jury testimony was taken before the immunized hearings ever took place; virtually all the substantive witnesses were known to the prosecution prior to the first immunity grant; and the prosecution was led to these witnesses by sources independent of the immunized testimony. Furthermore, each witness was instructed not to repeat to the grand jury any immunized testimony to which he may have been exposed. 698 F. Supp. at 311-12.[14]

The precautions taken and the instructions given here are fully adequate under the law. In fact, as

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[12] Two replacement grand jurors were qualified, one in December 1989 and one in January 1988, after the immunized testimony had been taken before the congressional committees. The Court has reviewed the grand jury records regarding these grand jurors and agrees with Judge Gesell that although they were not questioned in detail about possible knowledge of immunized testimony, they were in the course of events adequately warned. *See North*, 698 F. Supp. at 311 n.13.

[13] Petit jurors frequently are admonished not to pay attention to or be influenced by media accounts and, absent evidence to the contrary, it is presumed that they complied with the instructions.

[14] "Cooperating" witnesses agreed to avoid exposing themselves to any of the immunized testimony.

noted above, convictions have been upheld on appeal even where *the same grand jury* heard the immunized testimony and indicted the immunized defendant. *E.g., United States* v. *Garret, supra*; and cases cited in note 10, *supra*. In light of such precedents, the minor taint defendant speculates on—and that was found to be non-existent by Judge Gesell—could not conceivably invalidate the indictment here. *See United States* v. *Rogers*, 722 F.2d 557, 560-61 (9th Cir. 1983).

While, to be sure, it is impossible to know with mathematical or scientific certainty that each grand juror and each grand jury witness complied with the Court's instructions, in view of the dictates of grand jury secrecy, the absence of precedent regarding grand juror testimony in a *Kastigar* hearing, and the minimal possibility of taint, the Court has no hesitancy first, in following Judge Gesell's ruling in this regard as the law of the case, and second, making the same finding on its own.

IV

Prosecuting Attorneys

Several of the appellate precedents suggest that prosecuting attorneys are not disqualified from trial proceedings even if they were broadly exposed to a defendant's immunized testimony. *See, e.g., United States* v. *Mariani*, 851 F.2d 595, 601 (2d Cir. 1988); *United States* v. *Caporale*, 806 F.2d 1487, 1518-19 (11th Cir. 1986); *United States* v. *Crowson*, 828 F.2d 1427, 1430-32 (9th Cir. 1987).[15] Those conclu-

[15] As the Court stated in *Crowson*, 828 F.2d at 1430, the focus of the inquiry under *Kastigar* is not whether the prosecutor was aware of the contents of the immunized testimony but whether he used the testimony against the defendant.

sions may well be correct.[16] Nevertheless, out of an abundance of caution, and in order to provide the most complete protection to defendant's Fifth Amendment rights, the Court has reviewed the record to determine whether the prosecuting attorneys in this case were exposed to that testimony and, as discussed *infra*, it ordered that a special evidentiary hearing be held to dispel any doubt in that regard.

The Court is satisfied that the prophylactic measures summarized in note 1, *supra*, which were adopted by the Independent Counsel to shield the attorneys on his staff assigned to the Poindexter, North, and Hakim cases, were fully adequate to prevent any taint from immunized testimony. The Court accordingly finds as a fact that all attorneys who were subjected to these measures are free of any taint that would call for their disqualification either before the grand jury or at the forthcoming trial.[17]

Two of the attorneys who are expected to participate in the Poindexter prosecution, Dan Webb [18] and Howard Pearl, were not so shielded because they

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[16] Defendant's Post-Hearing Memorandum is primarily devoted to an effort to demonstrate that the prosecutors (and even congressional counsel) were exposed to his immunized testimony, and that this improperly tainted prospective trial witnesses. *See, e.g.*, Memorandum at 8, 12-13, 16-20. As discussed *infra*, this is largely incorrect as a matter of fact. Furthermore, in view of the discredited status of *McDaniel, supra*, and the more recent and more persuasive decisions in *Mariani, Caporale*, and *Crowson*, it is also irrelevant as a matter of law in a situation where, as here, prosecutorial exposure was minor and incidental at best.

[17] *See United States* v. *Schwimmer*, No. 89-6048 (1st Cir. August 1, 1989) ; *Byrd*, 765 F.2d at 1531-32.

[18] Mr. Webb is to be the government's chief trial counsel.

joined the Independent Counsel staff at a much later time. Although these attorneys have filed affidavits asserting that they have no conscious knowledge of the congressional proceedings, the Court has required that they appear at an evidentiary hearing where they were examined by both parties regarding their taint.

Dan Webb, former United States Attorney for the Northern District of Illinois, testified that he had no recollection of defendant's testimony in Congress. At the time that testimony was provided, Webb was in the private practice of law in Chicago, engaged in litigation which consumed many hours every day [19] and took all of his time and energies. He did not watch any of Poindexter's congressional testimony on television, and while he did read about him in newspapers, he has no recollection of any of the facts to which defendant testified.[20] After Webb was hired in September 1989 by Independent Counsel Lawrence Walsh to be the chief trial counsel for the Poindexter case, he followed a procedure similar to that set up for the attorneys who initially joined the Independent Counsel staff: he did not read, listen to, or watch any media accounts relating to Iran-contra, and the Independent Counsel staff has been redacting all news accounts to eliminate references to Poindexter's congressional testimony. None of this testimony was shaken or altered during fairly extensive cross examination.[21]

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[19] Pursuant to the Court's direction, Webb's diary and time sheets were produced to the defendant.

[20] That is not too surprising; the Poindexter testimony received substantially less publicity than did that of Oliver North.

[21] Defendant brought out that Webb was interested in and active in politics; he placed in evidence accounts in the

The testimony of Howard Pearl, a former Assistant U.S. Attorney in Chicago, who was recruited for the Independent Counsel staff by Webb, was in most respects similar to Webb's. Like Webb, he disclaimed any knowledge of Poindexter's immunized testimony, and like Webb, following his employment by the Independent Counsel, he kept himself, and was kept by others, away from Iran-contra news accounts which in any way referred to that testimony. Two matters arose during Pearl's cross-examination from which some element of knowledge might be deduced: (1) in 1987, Pearl became aware of an issue of "what President Reagan knew" and that "he didn't know of a diversion" presumably of Iran funds to the Contras (Tr. of December 11, 1989 hearing at 155); and (2) Pearl read part of an article in the *New Yorker* magazine which speculated on the submission of a document showing that the President had approved the diversion (Tr. at 162). The Court has considered these items as well as the entire testimony of Pearl; and it concludes that they are insufficient to disqualify him. His awareness of an issue regarding President Reagan's knowledge of Iran-contra does not indicate exposure to immunized testimony, if only because the issue had become a matter of public interest and speculation many months before Poindexter testified. Similarly, the defendant's cross-examination of Pearl failed to show that he had made

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Chicago news media regarding Poindexter's immunized testimony; and Webb testified to various activities which could have resulted in attention to news accounts. However, Webb was entirely unshaken in his conclusion that he could not recall ever having been exposed to any portion of defendant's immunized testimony.

inferences based on the *New Yorker* article about the contents of the immunized testimony. The Court will not disqualify—and no court has ever disqualified—a prosecutor based upon so theoretical a possibility of taint.

Since Webb and Pearl have no recollection of the contents of defendant's immunized testimony, neither could possibly make any use of it in "Interpreting evidence, planning cross-examination and otherwise generally planning trial strategy." *McDaniel*, 482 F.2d at 311. Thus, even under the broadest view of *Kastigar*, whatever exposure Webb and Pearl might have had is insufficient to disqualify them. Both may therefore participate in the Poindexter prosecution.

V

Trial Witnesses

The Court has also taken wide-ranging measures to ensure that trial witnesses would testify on the basis of independent knowledge, as distinguished from knowledge acquired from Poindexter's congressional testimony.

A. *Principles and Procedures*

It is appropriate to state first the principles the Court is applying in approaching the subject of the testimony of trial witnesses.

Where it appears from the materials reviewed by the Court (*see infra*) that the witness will testify entirely on the basis of his independent knowledge, without any taint or influence from the immunized hearings, he will be permitted to testify at the trial without more. The issue whether an individual would testify solely on the basis of his own independent

knowledge is, of course, a factual one, which the Court has resolved on the basis of such factors as whether the information was furnished to the government before defendant gave his immunized testimony, whether the witness' testimony is based on contemporaneous documents antedating the immunized testimony, whether it deals with subjects that were not covered in the immunized testimony, and the like.

The Court could not be certain that, although the witness provided information to the government prior to the taking of the immunized testimony, he might not have been influenced by that testimony in such a way as to change his earlier statements on that basis. Where that was a possibility, the Court considered whether the witness' statements, as proffered by the government, were based in part on post-July 15, 1987[22] events or appeared to differ from the statements the witness had provided prior to that date. Where the "new" materials only added to earlier statements in slight details that appeared to be of no real consequence insofar as the issues in the case were concerned, the Court decided that *Kastigar* considerations would be satisfied by reliance on the instructions it would give to trial witnesses at the outset of their testimony; its power to cut off lines of questioning if appropriate; and the possibility of a post-trial *Kastigar* hearing.

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[22] July 15, 1987 was the date when Poindexter began his public congressional testimony. Some of the orders issued by the Court referred to the date of June 15, 1987, to take account of Poindexter's statements in executive session, but it now appears that such statements would be irrelevant to the present issues.

With respect to the remaining witnesses, the Court considered their appearance at a pretrial *Kastigar* hearing at which they could be cross-examined by defendant's counsel regarding taint and the independent nature of their testimony. The procedure for selecting those who were to be heard pretrial was as follows.

Initially, the government was directed to furnish to the Court *ex parte* a list of its trial witnesses and a description of their anticipated testimony, with particular reference to the question whether or not that testimony was known to government counsel prior to July 15, 1987, the date Poindexter began giving his immunized testimony in Congress. In response to that direction, the government provided the Court with a synopsis of the anticipated testimony of forty-seven individuals.

The Court considered this submission from the point of view of making a determination whether leads to the testimony or its substance were likely to have come from the immunized testimony of the defendant. With respect to the bulk of the witnesses, all of their proposed trial testimony had been memorialized prior to July 15, 1987, by way of information these same persons had provided to the grand jury, the Federal Bureau of Investigation, the so-called Tower Commission, a congressional committee, or a combination of these.[23] It follows that the testimony of these witnesses was not likely to have been influenced in any way by Poindexter's appearance before the congressional committees. *See United States* v. *Lipkis*, 770 F.2d 1447, 1451 (9th Cir. 1988).

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[23] The Court reviewed all the grand jury transcripts and the FBI's "302 Forms."

With regard to a smaller number of prospective witnesses, the government's papers claimed that, although much or most of their trial testimony would be confined to subjects and details made known to the government prior to July 15, 1987, on some subjects that testimony would not be so limited. It was also claimed, however, that as concerns the post-July 15, 1987 items, the witnesses would testify exclusively on the basis of actions they had taken themselves or which otherwise were matters within their own participation and knowledge, and thus independent of defendant's immunized testimony.

In order to satisfy itself that the testimony of these witnesses was, in fact, independent of that immunized testimony, the Court studied the witnesses' post-July 15, 1987 grand jury and FBI submissions to determine their subject matter both as to scope and detail, as well as the question whether they did, in fact, relate to facts within the independent participation or knowledge of the witness. In conjunction therewith, the Court also reviewed Poindexter's congressional testimony to catalogue its subject matter and to compare it with the proposed testimony of each of these potential government trial witnesses.

With respect to several of these witnesses, it became clear from these reviews (1) that their testimony will not relate to the subjects to which Poindexter testified pursuant to his grant of immunity, or (2) that the witness' post-July 15, 1987 submissions to the government were only insubstantial elaborations of information the witness had furnished prior thereto. The Court did not require witnesses in these categories to appear for a pretrial *Kastigar* hearing. However, where a determination on the issue of whether an individual's prospective testi-

mony was independent of the immunized Poindexter statements was not possible on the papers filed by the government, the Court directed the government to provide it with additional documentary evidence which might render possible such a determination. Such additional evidence was submitted, and it, too, was reviewed by the Court.

Following the completion of all these procedures, the Court concluded that, to ensure compliance with *Kastigar*, it was appropriate to hold an evidentiary hearing for five of the prospective witnesses. At that hearing, held for three days beginning on December 11, 1989, counsel for the defendant had the opportunity to cross-examine the witnesses regarding possible taint from the Poindexter immunized testimony as well as on the issue of an independent source for the witnesses' anticipated testimony.[21] The hearing yielded the following results.

B. *Rafael Quintero*

Quintero, a former associate of General Secord (one of the Iran-contra defendants) and of Contra leaders, who may be expected to testify at trial con-

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[24] The Court instructed the Independent Counsel that, to avoid tainting the trial prosecutors with information from Poindexter's immunized testimony which was bound to come out as part of the cross-examination at the hearing, he should use for the cross-examination and redirect examination phases of the hearing counsel other than those who would conduct the Poindexter trial itself. There was some dispute between the parties regarding the logistics of this safeguard, but ultimately the Independent Counsel made satisfactory arrangements. While it is unfortunate that such complicated processes had to be set up, the Fifth Amendment and *Kastigar* were best satisfied on this basis.

cerning assistance rendered to the Contras, testified at the *Kastigar* hearing that while he met a number of times with Oliver North, he did not know Poindexter. Although he watched the congressional Iran-contra televised hearings, including that of Poindexter,[25] he knew nothing of Poindexter except that he was Robert McFarland's successor as National Security Advisor. Quintero further testified that his recollections were based upon his personal knowledge of "things [he] did" and his review of contemporaneous documents.[26] Only in one area did he acknowledge being affected by immunized testimony,[27] and the Independent Counsel has informed the Court that Quintero will not be asked to testify on that topic.[28] The Court has no hesitancy in finding that Quintero is untainted by Poindexter's immunized testimony, and that his proposed testimony has an independent basis.

C. *Associates of Poindexter*

The remaining witnesses who testified at the *Kastigar* hearing were four associates of Poindexter's at the National Security Council—Ronald Sable,

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[25] He does remember Poindexter's using the phrase "the buck stops here," but no relationship of that comment to other subjects was established.

[26] As he put is, "[i]f the questions are based on the facts, yes, I can testify without any problem." Tr. of December 11, 1989 hearing at 107.

[27] Quintero stated that his views regarding his authority to aid the Contras were changed by defendant's immunized testimony. Tr. at 100.

[28] Government Memorandum at 6.

Karna Small, Kenneth deGraffenried, and Oliver North.

Sable and Small will apparently be called at the trial primarily to identify and explain documents prepared during the period when Poindexter was National Security Advisor or Deputy National Security Advisor. In addition, Sable attended meetings with congressional personnel, he participated in drafting responses to their inquiries, and he had discussions with Poindexter regarding the latter's view of Congress.

As concerns his knowledge of Poindexter's immunized testimony, it appears that he was present when that testimony was given, and he also watched other parts of the Iran-contra hearings on television. Sable testified that some details from the hearings colored his perceptions and altered some of his conclusions, but he went on to state unequivocally that his proposed trial testimony would be based upon his personal recollections of the events in which he participated.[29] The witness also stated, again without equivocation or qualification, that the substantive answers he gave to government counsel (and thus presumably the testimony he would give at trial) was not "in any way affected by Admiral Poindexter's immunized testimony." Tr. at 46-47. These statements are entirely credible, indeed they are honest, since it was obvious that the witness, like several

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[29] While Sable testified that Poindexter's testimony caused him to reach a different conclusion concerning the veracity of McFarland's 1985 letters to Congress, the government will not seek to elicit testimony from him concerning the truth or falsity of these letters. Government's Post-Hearing Memorandum at 4.

others, would have preferred not to testify against his former colleague Poindexter. A claim of having been heavily influenced by the Poindexter testimony might well have permitted him to escape becoming a witness.

Karna Small, who was Senior Director of Public Affairs during the period of the Iran-contra transactions, is expected to testify regarding her handling of two requests made by members of the media for comment on Iran-contra. While she was aware of the contents of the defendant's immunized testimony, she testified that it only "tended to validate my sense that nothing was going wrong, that things were being done in a proper fashion" [30]—an opinion which the government presumably does not intend to elicit from her at trial. The Court concludes that Small's proposed trial testimony is untainted and has an independent basis.

Kenneth deGraffenried, who headed the Intelligence Directorate of the National Security Council, is to testify on three related topics: a November 1986 telephone call from Oliver North to deGraffenried requesting original copies of NSC System IV [31] documents relating to Central America; a subsequent conversation in which Poindexter told him to provide the documents to North; and the actions to facilitate North's request. On June 19, 1987—before he was exposed to defendant's immunized testimony—de-

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[30] Tr. at 73-74. On cross-examination and on re-cross, counsel for the defendant was not able to elicit from the witness any additional way in which she was affected by the immunized testimony.

[31] System IV is a computer system the NSC uses for sensitive intelligence matters.

Graffenried gave sworn deposition testimony tracking his proposed trial testimony, except to the extent that his memory was then hazy and uncertain as to some events. Subsequently, he heard Poindexter, in immunized testimony, provide a different account of the same events. However, the witness stated flatly several times that the differences strengthened, rather than undermined, his belief in the correctness of his own recollections.[32] Finally, this witness testified that, from the time of his initial testimony before congressional investigators to last week's *Kastigar* hearing, he had always offered a consistent account.

deGraffenried's testimony indicates that he is able to distinguish between his recollections prior to his exposure to immunized testimony and those formed afterwards, and that he is capable of testifying accordingly. Further, an independent basis unquestionably exists for his proposed testimony. The Court therefore concludes that this witness may testify at trial.

D. *Oliver North*

Because of his close association with Poindexter during the events giving rise to the indictment, North may potentially be the most important government witness at trial. At the *Kastigar* hearing, he flatly stated, and he reiterated in various forms during his testimony, that he could not separate his own experiences during the events at issue from what he had heard and read about them in Poindexter's im-

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[32] deGraffenried testified that Poindexter's account, "sort of gave me more confidence in [my] own recollection," Tr. at 130, and "strengthened my belief that my hazy recollection of those events was correct." Tr. at 143.

munized testimony. The Court is skeptical regarding this claim. North has every incentive to protect Poindexter from the damage that might be done to him by the North testimony. The two were working closely together at the National Security Council; they were both charged with similar offenses; and indeed they were co-defendants until their trials were severed last year. It may also be presumed that North is not keen on testifying against anyone on Iran-Contra, least of all the person whom he characterized in the hearing before the Court as the only one who "didn't hang Ollie North out to dry." Tr. at 418.

Inasmuch as North was granted immunity from prosecution, he could not refuse to testify against Poindexter on self-incrimination grounds. Thus, the claim that he was unable to tell whether his testimony at Poindexter's trial would be based on his own recollection of the events in which he participated, as distinglished from his recollection of the Poindexter immunized statements, represented an obvious alternative means to avoid becoming a trial witness.

As indicated, the Court takes North's alleged inability to differentiate with a grain of salt. It seems unlikely that a witness who was a major and active participant in the events themselves [33] would be unable to distinguish between the version of events described in another's testimony and his own recollection of what occurred. Yet that is what North claimed, and the question is whether the Court's doubts concerning credibility justify it in rejecting his testimony as to the basis for his memory of events.

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[33] Moreover, North testified twice without difficulty concerning these events, once before congressional committees and once at his own criminal trial.

After considerable reflection, the Court has decided that it will accept the North assertion, and on that basis hold him to be so tainted by his exposure to the Poindexter testimony that his own independent knowledge of the events cannot carry the day. In view of the inability of the judicial system to take independent evidence of the North thought processes, that individual's testimony at the *Kastigar* hearing stands necessarily unrefuted. With the issue in that posture, the Court could decline to credit that testimony only if it were to reject North's assertions as entirely unbelievable.

Were the issue one of lesser gravity, the Court would be prepared to do just that.[34] But the issue here revolves around the constitutional rights of the defendant. At bottom, what is before the Court is the self-incrimination clause of the Fifth Amendment which underlies the immunity-*Kastigar* doctrine—a doctrine which occupies a central place in the American constitutional system. If in its application of the facts to that doctrine the Court is to err, it is most consistent with its obligations to the Constitution and the Bill of Rights that it err on the side of protecting Poindexter's constitutional right not to be convicted

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[34] This conclusion is strengthened by the fact that, in spite of repeated prodding, North claimed to be unable to pinpoint a single subject or fact on which the Poindexter testimony did not influence his recollection. That recollection was said to be permeated by that testimony as to all events in which North personally participated. These claims are even more dubious than the basic claim that, in general, the witness could not separate out his own recollections from the Poindexter immunized statements. However, they neatly serve the purpose of keeping North off the witness stand.

with the use of his own testimony.[35] That is accordingly what it will do. North will therefore not be required to testify on any subject with respect to which his testimony is based on the Poindexter statements to the congressional committees.

However, this ruling will not entirely excuse North from appearing as a witness at the trial, for with respect to two areas his recollection could not possibly be confused by the Poindexter statements. First, North gave testimony to the congressional committees before Poindexter did, and his testimony to these bodies therefore could not have been influenced by the statements Poindexter made to them thereafter. Second, not all the evidence North might be expected to provide at the trial was the subject of immunized testimony by Poindexter. If Poindexter did not testify as to a particular matter, testimony at his trial by North concerning that matter would not be an invasion of Poindexter's Fifth Amendment rights.

In accordance with these rulings, the Court hereby directs the government that, although it may call Oliver North as a witness at the trial of this case, it may only elicit evidence from him that will be based on statements made by North prior to July 15, 1987, or that was not also the subject of Poindexter's immunized testimony.[36]

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[35] The burden under *Kastigar* is always on the government to prove that the evidence it proposes to use is derived from a source wholly independent of the immunized testimony. *Kastigar*, 406 U.S. at 460; *Rinaldi*, 808 F.2d at 1582-83.

[36] Where North's information is based on Poindexter's pre-July 15, 1987 statements and was repeated in immunized testimony given after that date, the information has an independent source and may be elicited by the government.

E. *Conclusion*

On the basis of the measures discussed above, the Court is confident that the government's trial witnesses will testify from knowledge that is independent of the information elicited from Poindexter at the congressional hearings. As with any determination that is prospective in character, the Court's finding cannot absolutely ensure that, somehow, some unpredictable trial event may not occur to alter the situation—particularly as several counsel will be examining and cross-examining, and as the witnesses have varying degrees of loyalty to the Independent Counsel or may even be aligned in interest with Poindexter, as well as perhaps having interests of their own. To protect against such contingencies, the Court expects to take several additional measures: (1) it will admonish each witness at the outset of his testimony not to refer to or rely on what he may have heard, read, or learned from Poindexter's immunized testimony; (2) it will cut off any line of questioning, or any answers, that would appear to invade this prohibited territory; and (3) if necessary, it will hold another *Kastigar* hearing at the conclusion of the trial in the event of a conviction of the defendant.

The motion to dismiss the indictment on *Kastigar* grounds is denied.

/s/ Harold H. Greene
HAROLD H. GREENE
United States District Judge

December 19, 1989

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 90-3125

UNITED STATES OF AMERICA

v.

JOHN M. POINDEXTER, APPELLANT

Before: Mikva, Chief Judge; D. H. Ginsburg and Sentelle, Circuit Judges

ORDER

[Filed July 8, 1992]

Upon consideration of appellant's petition for rehearing, filed December 30, 1991, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:

CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

(3)

No. 92-591

Supreme Court, U.S.
FILED
NOV 10 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA,
Petitioner,

v.

JOHN M. POINDEXTER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Independent Counsel proved that Admiral Poindexter's compelled immunized testimony was not used against him at trial.

2. Whether 18 U.S.C. § 1505 proscribes the making of misleading statements to Congress with constitutionally sufficient clarity or, indeed, at all.

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STATEMENT

1. *Background.* Respondent John M. Poindexter served as an officer in the United States Navy for almost thirty years. He graduated first in his class from the United States Naval Academy in 1958, earned a Ph.D. in nuclear physics at the California Institute of Technology in 1964, and by 1980 had risen to the rank of Rear Admiral. In June 1981 Admiral Poindexter was assigned to a position on the staff of the National Security Council ("NSC"). He was appointed Assistant to the President for National Security Affairs ("National Security Advisor") in December 1985. As National Security Advisor, he was responsible for advising the President on national security matters and overseeing the implementation of national security policy. *See* Joint Hearings before the House Select Committee to Investigate Covert Arms Transactions with Iran and the Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition, *Testimony of John M. Poindexter*, 100th Cong., 1st Sess., pp. 11-13 (1987) (*"Poindexter Testimony"*). This case arises out of two covert national security operations that began when Admiral Poindexter was on the NSC staff and continued after he became National Security Advisor: (1) covert sales of military equipment to Iran, made in an effort to establish better relations with that country and to obtain its assistance in securing the release of American hostages held in Lebanon; and (2) covert assistance to the rebel forces known as Contras who were opposing the Sandinista regime in Nicaragua.

2. *Assistance to the Contras.* In October 1984 Congress enacted the so-called Boland Amendment barring any governmental agency "involved in intelligence activities" from using appropriated funds to support military operations in Nicaragua. Continuing Appropriations, 1985—Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 8066(a), 98 Stat. 1935 (1984). This strict limitation was partially relaxed in December 1985. *See* Intelligence Authorization Act For Fiscal Year

1986, Pub. L. No. 99-169, § 105, 99 Stat. 1003 (1985); Further Continuing Appropriations, 1985, Pub. L. No. 99-190, § 8050, 99 Stat. 1211 (1985). The Boland Amendment did not define "intelligence activities," but that term was defined by Executive Order No. 12,333, 3 C.F.R. 200 (1981), in a manner that included the activities of the Central Intelligence Agency ("CIA") and several other agencies but excluded, by implication, the activities of the NSC. President Reagan was advised by the Intelligence Oversight Board in September 1985 that the Boland Amendment did not apply to the NSC. J.A. 1125-26 ("J.A." refers to the joint appendix in the court of appeals); *Report of the President's Special Review Board* at III-22 (1987) (*"Tower Report"*).

Robert C. McFarlane had been the National Security Advisor from before October 1984 until December 1985, during the period when the Boland Amendment's limitation on assistance to the Contras was most stringent. J.A. 1208-09, 1213-15, 1219-21. At that time, Lieutenant Colonel Oliver L. North, the member of the NSC staff responsible for monitoring developments in Nicaragua and maintaining contacts with the Contras, consulted with the Contras on military matters and assisted them in raising funds from third parties. J.A. 1127-29, 1227-28. After Admiral Poindexter succeeded McFarlane as National Security Advisor in December 1985, North continued to consult with and assist the Contras. J.A. 1352-54, 1385.

3. *Arms sales to Iran.* Covert operations involving sales of military equipment to Iran originated in August and September 1985 when Israel, after consulting with McFarlane, transferred 504 TOW anti-tank missiles to Iran. J.A. 1442-43, 1469-72, 1620-21. Shortly thereafter, Reverend Benjamin Weir, an American hostage in Lebanon, was released by his captors. *Tower Report* at III-8. In view of the apparent success of this Israeli initiative, McFarlane and North arranged for the CIA to assist Israel in making an additional transfer of 18 HAWK

anti-aircraft missiles to Iran in November 1985. J.A. 1473-81.

A few days later, the CIA prepared and President Reagan signed a Finding retroactively granting authorization to the CIA to assist Israel in transferring the missiles; that December 1985 presidential Finding described the transfer as an exchange of arms for hostages. J.A. 1489-98. In January 1986 President Reagan signed two additional Findings prospectively approving the United States' covert participation in the sale of military equipment to Iran; those Findings omitted any reference to hostages. J.A. 1499-1500, 1508, 2368, 2608. Pursuant to those Findings North and others proceeded to negotiate and arrange for the sale of approximately 1500 additional missiles to Iran. J.A. 1509-14. Two more American hostages in Lebanon were released following those sales. J.A. 1110.

4. *The Iran-Contra Affair.* In November 1986 a Lebanese newspaper reported that the United States had secretly sold weapons to Iran. *Tower Report* at III-19. Admiral Poindexter then met privately with members of two congressional intelligence committees to brief them on the sales. *Id.* at IV-13. Shortly thereafter, it was disclosed that North had caused proceeds from the arms sales to be remitted to the Contras. *See* J.A. 1440-41, 1444-56. This led to a political firestorm over what came to be known as the "Iran-Contra Affair," and in December 1986 Poindexter resigned as National Security Advisor. An Independent Counsel ("IC") was appointed to investigate the possibility of criminal wrongdoing. *See* J.A. 240 n.3; *United States v. Poindexter*, 698 F. Supp. 300, 303 n.3 (D.D.C.), *mandamus denied*, 859 F.2d 216 (D.C. Cir. 1988), *cert. denied*, 490 U.S. 1004 (1989).

Congress also conducted its own parallel investigation. The IC vigorously urged Congress not to grant immunity to witnesses, warning that "use and derivative use immunity would create serious—and perhaps insurmountable—barriers to the prosecution of the immunized wit-

ness" and that in many cases immunity "*will effectively preclude a future prosecution of the witness for the matters to which his/her testimony related.*" Memorandum of the Independent Counsel Concerning Use Immunity 1, 6 (Jan. 13, 1987) (emphasis in original); *see also United States v. North*, 910 F.2d 843, 863 ("*North I*"), *modified*, 920 F.2d 940 (D.C. Cir. 1990) ("*North II*"), *cert. denied*, 111 S. Ct. 2235 (1991). Nonetheless Congress, determining that its oversight responsibilities outweighed the IC's prosecutorial concerns, sought and obtained an order compelling Admiral Poindexter to testify pursuant to a grant of immunity under 18 U.S.C. § 6002. *See* J.A. 241-42; *Poindexter*, 698 F. Supp. at 303-04. Poindexter's public testimony, which commenced on July 15, 1987, was broadcast live on national television and radio and received extensive coverage in the press. *Id.*; J.A. 1032.

5. *Grand Jury proceedings.* The IC procured a five-count indictment against Admiral Poindexter. The indictment did not allege that the covert operations involving Iran and the Contras were unlawful; instead, its principal thrust was that Poindexter had misled Congress about those operations during his tenure as National Security Advisor. He was charged with two counts of obstructing Congress in violation of 18 U.S.C. § 1505, two counts of lying to Congress in violation of 18 U.S.C. § 1001, and one count of conspiracy to commit such offenses in violation of 18 U.S.C. § 371. J.A. 186-219. Poindexter moved to dismiss this indictment on the ground that the grand jury had heard from witnesses whose own testimony was tainted by their exposure to his immunized testimony. The district court denied the motion: even the facts that "many grand jury . . . witnesses were thoroughly soaked in . . . immunized testimony," *North I*, 910 F.2d at 863, and that Poindexter may have been "placed in a substantially worse position by the possible refreshment of a witness' memory through such exposure," J.A. 266; *Poindexter*, 698 F. Supp. at 314, gave the court "no concern." *Id. See also* Pet. App. D at 148a, 151a (reconfirming this ruling as "law of the case").

6. *The charges of obstructing Congress.* Only counts 2 and 3 of the indictment, charging Admiral Poindexter with obstructing Congress in violation of 18 U.S.C. § 1505, are of immediate concern here. Count 2 alleged two obstructive acts during July and August 1986 relating to congressional consideration of House Resolution ("H. Res.") 485, 99th Cong., 2d Sess., a proposed resolution of inquiry into the "activities of Lieutenant Colonel Oliver North or any other member of the staff of the National Security Council in support of the Nicaraguan resistance." J.A. 2387. Count 3 alleged three obstructive acts during November 1986 relating to the congressional investigation into the transfer of HAWK missiles to Iran.

The first obstructive act alleged in count 2 concerned Admiral Poindexter's written responses to requests from two House committees for comment on H. Res. 485. Poindexter's predecessor, McFarlane, had responded to a similar request one year earlier by advising Congress both that the NSC staff, including North, was acting within the spirit and letter of the law (the Boland Amendment) and, falsely, that North was not engaged in giving advice to or soliciting funds for the Contras. J.A. 2326-29, 2330-32, 2341-49. In 1986 Poindexter sought to deflect renewed inquiry by redirecting the House committees to the portion of McFarlane's statement that related to the Boland Amendment:

> I understand that information on the specific issues raised in H. Res. 485, was provided to your Committee and that this information made it clear that the actions of the National Security Council staff were in compliance with both the spirit and letter of the law regarding support of the Nicaraguan resistance.

J.A. 209-10. The indictment alleged that this response was "false, fictitious, fraudulent and misleading" and as such constituted an obstruction of Congress in violation of 18 U.S.C. § 1505. J.A. 210.

One of the House committees, not satisfied with Admiral Poindexter's response, requested an opportunity to

meet directly with North. Poindexter honored this request by arranging a meeting; at that meeting North, without Poindexter directing him or knowing that he would do so, falsely denied giving military advice to the Contras. J.A. 211. The indictment alleged that Poindexter's role in arranging the meeting constituted a second obstructive act. J.A. 212.

The three obstructive acts alleged by count 3 were (1) that Admiral Poindexter participated in the preparation of a false and misleading chronology (which, however, was never submitted to Congress) regarding the November 1985 transfer of missiles to Iran; (2) that he made "false, fictitious, fraudulent and misleading" statements to members of Congress concerning that transfer; and (3) that upon leaving his position as National Security Advisor he deleted from the memory of his office computer thousands of electronic mail messages (which, however, were retained in the NSC's central computer system). J.A. 213-15, 1696-1700, 1918.

7. *Pretrial proceedings.* As it was required to do by *Kastigar v. United States*, 406 U.S. 441 (1972), the district court undertook to consider whether and to what extent prospective witnesses, all of whom had been exposed to Admiral Poindexter's immunized testimony, would be permitted to testify at trial. But of the 25 witnesses who ultimately testified, only three (North, Karna Small, and Ronald Sable) were required to appear at the pre-trial *Kastigar* hearing (two other witnesses also appeared at the hearing but were not called at trial). *See* Pet. App. D at 159a-161a. As to all other trial witnesses the court conducted, at most, only an "in-chambers review . . . [that] neatly avoided any cross-examination of witnesses who were admittedly exposed to the immunized testimony." *North II*, 920 F.2d at 944. Although the IC offered "canned" statements (statements given in advance of Poindexter's immunized testimony) from only nine of the remaining 22 trial witnesses, and advised the court *ex parte* both that the trial testimony of three of those nine would go beyond matters contained in their

canned statements, J.A. 2627, 2653, 2657 (sealed), and that the testimony of the other six might do so, J.A. 2618 (sealed), the court was content to permit all such witnesses to testify at trial based solely upon its review of the papers that the IC had submitted *ex parte*. Pet. App. D at 158a-159a.

The pre-trial *Kastigar* hearing was principally devoted to the examination of Colonel North, who was slated to be "the most important government witness at trial." *Id.* at 163a. North testified that he had been "thoroughly immersed" in Admiral Poindexter's immunized testimony:

> I watched it on television as it happened. . . .
>
> I reviewed what was written in the papers, and the clippings that we had. I, of course, watched it on the newscasts as it was being given; and reviewed it with counsel in preparation for what we anticipated eventually happening.
>
> Then we went through that entire process again as I prepared for my trial, so that we would be able to introduce evidence that we believed would be helpful to my defense.

J.A. 949. North had "spent literally days with [Poindexter's] testimony as it happened, and then afterwards, and then again in preparation for [his] trial." J.A. 957; *see also, e.g.*, J.A. 750, 895. As a result, North testified, his "personal knowledge and recollection today is based on not just . . . living through those events, but it is also based on . . . Admiral Poindexter's own testimony." J.A. 738.

In response to repeated questioning from the IC, North declared that "I cannot tell you here today—nor could I have told you in my trial—that what I said was not the product of both having lived through it and having refreshed myself and having studied [the immunized testimony] very carefully." J.A. 759. He frequently prefaced his responses to questions with a disclaimer to the effect that he could not "certify to you what I am about to say has not been affected by Admiral Poindexter's testimony." J.A. 815; *see also, e.g.*, J.A. 746, 832,

956, 962. According to North, the only untainted testimony he could give "would be to repeat verbatim what I said before the congressional hearings, because that was prior to [Poindexter's] immunized testimony." J.A. 752; *see also* J.A. 958.

North was closely questioned concerning, *inter alia*, the December 1985 presidential Finding. In his own immunized testimony before Congress, North had stated that he could not specifically recall ever seeing the Finding but that he might have seen it in December 1985; he did not intimate that it was later destroyed. Joint Hearings before the House Select Committee to Investigate Covert Arms Transactions with Iran and the Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition, *Testimony of Oliver L. North*, 100th Cong., 1st Sess., pp. 33-34 (1987). However, Admiral Poindexter in his subsequent testimony before Congress stated that he had torn up the Finding in November 1986, possibly in North's presence, because he thought it could be "a significant political embarrassment to the President." *Poindexter Testimony* at 18-23. North thereafter testified in his own trial that he had seen Poindexter tear up the Finding. Transcript of Trial of Oliver L. North, Crim. No. 88-0080 (D.D.C. 1989) at 7612-13. Then, at the *Kastigar* hearing in this case, North explained that he had seen Poindexter tear up a paper and was "speculating," on the basis of Poindexter's immunized testimony, that it had been the Finding. J.A. 904. North could not say for certain what the document was without the aid of Poindexter's testimony. J.A. 967. "[I]t could have been any sheet of paper, but for the fact that [Poindexter] confirmed it [was the Finding]." J.A. 969. "I don't know for a fact, except that what Admiral Poindexter testified to, that the document that was destroyed that morning, or afternoon, or whenever it was, was indeed the Finding." J.A. 1015-16.[1]

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[1] North's testimony on this point was consistent with that of Commander Paul Thompson, the only other eyewitness to the Find-

Although the district court initially was "skeptical" regarding North's claim "that he could not separate his own experiences during the events at issue from what he had heard and read about them in Poindexter's immunized testimony," Pet. App. D at 163a-164a, it decided, "[a]fter considerable reflection, . . . that it will accept the North assertion, and on that basis hold him to be so tainted by his exposure to the Poindexter testimony that his own independent knowledge of the events cannot carry the day." *Id.* at 165a. The court ruled that North would be permitted to testify only (1) to matters covered by his own immunized testimony to Congress, which he gave before hearing Poindexter testify, and (2) to matters not covered by Poindexter's testimony. *Id.* at 166a. The IC immediately moved for modification of this ruling, contending that the government was entitled to North's testimony even though "his present recollection may be affected by defendant's immunized testimony." J.A. 1083; *see also* Pet. App. A at 8a-9a. In response, the court effectively countermanded its earlier ruling and held that "any of North's testimony that either elaborated upon or contradicted Poindexter's testimony could not, 'by definition,' be tainted and thus was admissible." *Id.* at 11a, quoting J.A. 1095-96 (Opinion of Jan. 4, 1990).

The parties then sought further clarification with specific reference to North's testimony concerning destruc-

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ing's destruction. Thompson told congressional investigators that Poindexter casually tore up the Finding in a manner that concealed the significance of what he was doing:

> [Poindexter] was sitting off to my left, and he would just kind of look at [documents taken from a file] and drop them or leave them on his lap. One document we came to he ripped up, not as a major action, but merely as he came to it. He ripped it up saying, "This is no longer necessary." Or, "This has no future." That document turns out to have been the finding of the fall of 1985.

Report of the Congressional Committees Investigating the Iran-Contra Affair, H.R. Rep. No. 433, 100th Cong., 1st Sess., App. B: Vol. 26, p. 1067 (1987). Thompson, like North, knew it was the Finding only because he "heard [Poindexter] say it on television." *Id.* at 1068.

tion of the presidential Finding. The IC urged that inability to elicit this "critical evidence," J.A. 1084, would "cut the heart out of the Government's case." J.A. 1176. In an order issued only minutes before commencement of opening statements to the jury, the court ruled that the IC would be permitted to present that testimony. The court reconfirmed that, "as a general proposition," it accepted North's assertion that he "could not distinguish between his own observations and the version of events described in [Admiral Poindexter's immunized] testimony." Pet. App. C at 133a. But the court believed that, with respect to "the particular issue under consideration here," *i.e.*, the destruction of the Finding, North's testimony at his earlier trial was sufficient to establish independent knowledge. *Id.*; *see also* Pet. App. B at 83a-84a n.40.

8. *Trial.* At trial, the IC was permitted to question North and other witnesses with little or no restriction as to subject matter. The district court's *Kastigar* instructions—which North, at least, had testified he could not follow, J.A. 737-39—did not warn witnesses against the use of immunized testimony to refresh recollection, focus their thinking, shape their own testimony, or alter earlier statements or understandings. *See, e.g.*, J.A. 1200. The IC was permitted repeatedly to use North's testimony from his own earlier trial—testimony that derived from North's painstaking study and careful adaptation of Admiral Poindexter's immunized testimony, *e.g.*, J.A. 949—to formulate leading questions and to refresh or impeach. *E.g.*, J.A. 1230-43, 1258-60, 1371-77, 1396-1416, 1430-34, 1451-52, 1526-29, 1547-80, 1595-1607, 1610-12.

Much of the IC's case at trial revolved around the existence and destruction of the December 1985 presidential Finding. The IC linked the destruction of the Finding to every charge in the indictment, telling the jury that "when John Poindexter destroyed that Finding that may be the most significant act you have to establish beyond any doubt in your mind that John Poindexter was intending to obstruct Congress, that John

Poindexter intended to participate in a conspiracy to obstruct Congress, and that John Poindexter in fact is guilty of those charges." J.A. 2072; *see also* J.A. 2068, 2090, 2092.

North's testimony furnished the principal proof of this "most significant act." That testimony resulted from the court's refusal to permit North to follow its own *Kastigar* instruction:

> Q. And you are certain, as you sit here before this jury, you know, do you not, that Finding you saw John Poindexter destroy, it was the Finding, the one signed by the President that had the politically embarrassing language in it, you know that, do you not?
> A. I need help here.
> The Court: Yes.
> The Witness: I am trying to remember your specific instruction to me as we started this, Your Honor, several days ago about certain aspects of other people's testimony.
> The Court: Oh. Well, you better not go into other people's testimony. Just from what you know of your own knowledge. You were there.
> A. Yes. I was.
> Q. In your own trial did you testify very definitely what you saw him destroy was the one with the politically embarrassing language?
> A. I did not have that same instruction in my trial, counsel.
> Mr. Webb: Your Honor, there has been a pretrial ruling on this matter.
> The Court: In a pretrial ruling I have ruled that your testimony at your trial where you said you were present and saw him tear it up is the credible testimony, the only credible testimony you are giving on this subject and I want you to follow that up.

J.A. 1602-03. North thus was forced to testify that Admiral Poindexter had destroyed the Finding, notwithstanding North's repeated protests that he had not known that fact apart from Poindexter's own immunized testimony.

The only other evidence of the Finding's destruction was provided by Representative Lee H. Hamilton, who chaired the House Committee before which Admiral Poindexter had given his immunized testimony. Hamilton was permitted to testify that he had heard Poindexter admit destroying the Finding, J.A. 1801-02—an admission indisputably made only during Poindexter's immunized testimony.

With respect to the two counts alleging obstruction of Congress, the IC, presumably relying upon the general rule that allegations pled in the conjunctive need be proved only in the alternative, *see Turner v. United States*, 396 U.S. 398, 420 (1970), contended that conviction could rest upon proof that Admiral Poindexter's statements to Congress were either false *or* misleading. Def. S.A. 9 ("Def. S.A." refers to the defendant's supplemental appendix in the court of appeals). The district court obliged by instructing the jury "that the corrupt furnishing of false *or* misleading statements constitutes an obstruction of Congress." J.A. 2186 (emphasis added).

Admiral Poindexter was convicted on all five counts and sentenced to concurrent terms of six months' imprisonment.

9. *Appeal.* The court of appeals reversed on two grounds:

> We reverse as to all counts because the [IC] has not carried his burden of showing that Poindexter's compelled testimony was not used against him at trial in violation of 18 U.S.C. § 6002 and the Fifth Amendment of the Constitution. We also reverse as to the two counts for violating 18 U.S.C. § 1505, on the grounds that the statute as written cannot constitutionally be applied to some of the conduct, specifically lying to or misleading the Congress, with which Poindexter is charged in those counts.

Pet. App. A at 2a. The court found it unnecessary to address other issues raised on appeal involving improper

jury instructions, insufficiency of the evidence, inadequacy of the procedures followed in inquiring into impermissible taint, and improper nonevidentiary use of immunized testimony.

a. *Use of immunized testimony.* The court began by recalling its earlier holding in *North* that section 6002 precludes "the use of immunized testimony by witnesses to refresh their memories, or otherwise to focus their thoughts, organize their testimony, or alter their prior or contemporaneous statements." *North I*, 910 F.2d at 860. *See* Pet. App. A at 8a. The court noted that the district court here applied a much narrower conception of "use" by accepting, for example, the IC's contention "that immunized testimony is not 'used' if it serves only to refresh a witness's recollection or if it merely influences his testimony." *Id.* at 8a-9a. Because the district court had applied the wrong legal standard, the court of appeals saw no reason "to defer to its ultimate factual finding on this issue." *Id.* at 11a.

The court concluded, moreover, that there was no need to "remand for new findings under the *North* standard . . . because the record plainly demonstrates that the IC has neither met his burden of proof nor indicated that there might be any additional evidence that he could put forward in order to meet that burden." *Id.* The court elaborated:

> Because the trial court applied its narrower standard for "use," it never made a finding that North's recollection (either at the time of his own trial or later at Poindexter's trial) was not refreshed or otherwise "shaped, altered, or affected" by his exposure to Poindexter's immunized testimony. And in view of North's immersion in that testimony (the effects of which he does not claim to be able to segregate), it would be clearly erroneous to hold that the IC met his "heavy burden," *Kastigar*, 406 U.S. at 461, of demonstrating that North's testimony was *not* influenced by Poindexter's immunized statements to the Congress.

Id. at 14a (emphasis in original). The court noted that, indeed, the IC had failed "to make any argument [or] offer any evidence tending to show that North's testimony was not influenced by his exposure." *Id.* at 16a.

In addition, as it had done in *North*, the court ruled that "unless the IC proves on remand that the evidence received by the grand jury was untainted, or that any taint was harmless beyond a reasonable doubt, the indictment must be dismissed." *Id.* at 18a.

Chief Judge Mikva agreed that the district court had applied the wrong legal standard but dissented from the majority's refusal to remand for new findings on the use of immunized testimony at trial; in his view, the record did not foreclose the possibility that the district court might conclude "after a full hearing applying the appropriate standard, that the prosecution has satisfied its burden." *Id.* at 47a.

b. *Obstruction of Congress.* The court of appeals then considered those portions of counts 2 and 3 that charged Admiral Poindexter with violating section 1505 by "lying to or misleading the Congress." *Id.* at 2a. The court's inquiry was narrowly focused; it expressly did "not rule upon any issues specific to Counts 2 and 3 other than the sufficiency of the allegations regarding false and misleading statements." *Id.* at 19a.

Section 1505 itself does not refer to the making of false or misleading statements; it punishes "[w]hoever corruptly . . . influences, obstructs, or impedes or endeavors to influence, obstruct, or impede . . . the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House." The court questioned whether the word "corruptly" has a sufficiently definite meaning, as applied to the making of false or misleading statements, to be the basis of a criminal conviction. *Id.* The court noted that, "on its face, the word 'corruptly' is vague." *Id.* at 20a. After a careful review, the court

determined that "the legislative history gives no better notice than does the statutory text that lying to or misleading a Member of Congress (or an agency) violates § 1505." *Id.* at 34a. Finding no prior decision extending section 1505 to reach statements alleged only to be false or misleading, *id.* at 34a-38a, the court concluded that the statute "is too vague to provide constitutionally adequate notice that it prohibits," and in fact does "not cover the conduct at issue on this appeal—making false and misleading statements to Congress." *Id.* at 22a, 39a.

Chief Judge Mikva concurred in this holding as to count 2 but not as to count 3. He explained:

> [T]here is a clear distinction between politically misleading (but literally true) advocacy and outright lying. No matter how devious the intent, a mere act of lobbying or otherwise seeking to persuade an official cannot fall under the definition of "corruptly" in the context of section 1505 . . . .

Id. at 52a. Judge Mikva concluded that application of section 1505 to count 2's allegations of mere "political positioning" would "stretch the statutory terms beyond constitutional limits." *Id.* at 52a-53a. But he believed that conviction on count 3 could be upheld (assuming the district court were permitted on remand to find that immunized testimony was not used at trial) because, in his view, Admiral Poindexter "*lied* to Congress about the existence of the first Presidential finding and then later destroyed it." *Id.* at 52a (emphasis in original). (This reveals some confusion about the scope of count 3: that count does not mention either the existence or the destruction of the presidential Finding, *see* J.A. 213-15; and the indictment called for conviction on that count, as well as on count 2, even if the jury found that Poindexter's statements were only misleading and not false. J.A. 2186).

ARGUMENT

This case does not involve any of the broad and loosely phrased questions that the IC seeks to present to this Court. With respect to the use of Admiral Poindexter's immunized testimony, the court of appeals applied precisely the same standard as in *North*—a standard so plainly correct that the IC makes no direct attack upon it here. Instead, the IC attacks a purported procedural ruling that the court manifestly did not make (question presented # 2) and a purported substantive standard that the court of appeals neither endorsed nor adopted as its own (question presented # 3). These are attacks on straw men. Furthermore, the IC's underlying concern—that conscientious enforcement of section 6002 and the Fifth Amendment may complicate or frustrate prosecution of persons compelled to give public immunized testimony, *see* Pet. 9, 21, 29—is no different from the concern the IC expressed *before* Poindexter testified. *See North I*, 920 F.2d at 863. The opinion below merely reconfirms the statutory and constitutional safeguards that appropriately attach when testimony is compelled.

With respect to the proper scope of section 1505, the IC both misstates and overstates the court's holding. The court did not hold globally that the statute is unconstitutionally vague (question presented #1). The court held only that the statute does not apply, and cannot constitutionally be applied, to an allegation of "lying to or misleading the Congress." App. A at 2a. This narrow ruling is solidly grounded in the statutory text, the legislative history, and legitimate concerns of due process. Furthermore, the IC's assertions to the contrary notwithstanding, *see* Pet. 9, 14, the court's ruling leaves no troublesome gap in the criminal law. Outright lying to Congress remains punishable under 18 U.S.C. § 1001. Apart from an advocate's use of literal truth to mislead, all other purportedly obstructive conduct of the kind hypothesized by the IC—specifically including the other allegations in

counts 2 and 3 here, *see* Pet. App. A at 19a—remain punishable under section 1505 itself. Consequently, the sole effect of the court's decision is to clarify that it is not a felony to make arguably misleading but truthful statements to Congress.

There is no conflict among the circuits on any of these issues. The decision below, which is rooted in the peculiar facts of a singularly unusual case, is correct and warrants no further review.

I. THE USE OF ADMIRAL POINDEXTER'S IMMUNIZED TESTIMONY.

The underlying question confronting the court of appeals was whether North's testimony—testimony whose content reflected North's thorough and purposeful study of Admiral Poindexter's immunized testimony—was "directly or indirectly derived from such [immunized] testimony" within the meaning of section 6002. The answer to that question was clear. The court already had held that section 6002 bars "the use of immunized testimony by witnesses to refresh their memories, or otherwise to focus their thoughts, organize their testimony, or alter their prior or contemporaneous statements." *North I*, 910 F.2d at 860. North's testimony in this case was the paradigmatic example of such improper use of immunized testimony.

1. The IC understandably does not directly challenge *North*'s holding that "[w]hen the government puts on witnesses who refresh, supplement, or modify th[eir] evidence with compelled testimony, the government *uses* that testimony to indict and convict" within the meaning of section 6002. *North I*, 910 F.2d at 860 (emphasis added). That holding flows directly from this Court's determination that the statute "prohibits the prosecutorial authorities from using the compelled testimony in *any* respect." *Kastigar*, 406 U.S. at 453 (emphasis in original). Not surprisingly, the IC is unable to point to

any case contrary to the decisions here and in *North*; the petition cites no case holding that a prosecution witness may be refreshed with immunized testimony.

Invoking "attenuation notions," however, the IC argues that "exposure of a witness to immunized disclosures that happen either to refresh his recollection or to shape his testimony in some subliminal way, especially when not the product of prosecutorial contrivance, is too remote a 'use' to require exclusion of the witness's evidence." Pet. 28. But that carefully couched contention is far removed from the facts of this case. North's exposure did not just "happen" to refresh his recollection or shape his testimony in "some subliminal way"; there was, moreover, ample "prosecutorial contrivance." Congress caused the public dissemination of Admiral Poindexter's immunized testimony, which Poindexter had wanted to give in closed session. *Poindexter Testimony* at 1-10. North and his counsel then exploited this public dissemination by carefully studying each line of immunized text for the specific purpose of crafting the story North could tell at his own trial. North's use of Poindexter's testimony in that trial was conscious, deliberate, and pervasive. The IC then took North's testimony from that trial, knowing it to be the product of his intensive and purposeful exposure, and, with the district court's energetic assistance, contrived to force North to repeat that tainted testimony in this case. *See* pages 7-8, 10-11, *supra*. The court of appeals had noted in *North*—in circumstances considerably less abusive than those here—that "it is hard to imagine a more *direct* use of immunized testimony than in such a situation, and therefore . . . the phrase 'attenuated use' seems quite inappropriate." *North II*, 920 F.2d at 947 (emphasis in original). This case follows *a fortiori*. And nothing in the series of inapposite cases cited by the IC, *see* Pet. 27-28, is at all to the contrary.

The IC further speculates, apparently as a suggested limitation on *North*, that "details of a witness's testimony that differ from or add to the immunized disclosures seemingly could not have been influenced by those dis-

closures." Pet. 27; *see also id.* at 24. But it takes only a modicum of common sense to realize that a witness' recollection may be different from the defendant's, or his testimony more expansive, and yet still be the product of exposure; for example, absent exposure the witness might have remembered, understood, or appreciated the events in a very different way, if indeed at all. *See, e.g., North I*, 910 F.2d at 862. In short, "[t]hat a witness proffers a more detailed account than, or rebuttal of, the defendant's immunized testimony . . . simply does not rule out the possibility that the witness's memory was refreshed or influenced by the immunized testimony." Pet. App. A at 11a.

2. The IC's principal contention here is not that *North* was wrongly decided but that the decision below "goes far beyond the earlier ruling in *North*." Pet. 9. The IC claims the decision stands for the rule that " 'the government must demonstrate affirmatively that the immunized testimony did not . . . [have] an influence on [the trial witnesses'] thinking, even one for which they cannot at this time consciously account.' " *Id.* at 26a, quoting Pet. App. A at 10a. (The IC is so fond of this quotation that it is made the foundation of question presented #3 and is repeated twice verbatim. *See id.* at i, 8-9, 26.) But as the IC surely knows, the quoted passage derives from the *district court's* opinion and constitutes only that court's belittling caricature of the argument of trial counsel. *See* Pet. App. D at 144a, quoted at Pet. App. A at 10a. The court of appeals, while holding that the district court itself applied the wrong standard, did not endorse or adopt that caricature as its own position. The court did nothing more than apply its earlier decision in *North* to the peculiar facts of this case.

The IC nonetheless asserts that in this case, unlike *North*, the court of appeals "was unable to point to any concrete reason to believe that witnesses had been affected by the immunized disclosures." Pet. 26. That is simply false. North gave unrebutted testimony that his recollection of numerous specific events was directly influenced

or enhanced by his probing study of Admiral Poindexter's immunized testimony, *see* pages 7-8, *supra*, and the court of appeals was well aware of that. *See* Pet. App. A at 12a. This is not a case involving only a mere inarticulable suspicion of taint. Indeed, if ever there was a witness affected by immunized disclosures, North was that witness. Furthermore, Representative Hamilton's testimony concerning the destruction of the Finding, J.A. 1801-02, indisputably was based upon Poindexter's immunized testimony.

3. The IC contends that the court of appeals imposed "a procedural requirement of unparalleled strictness: it effectively held that a witness whose trial testimony was not 'canned' and who was exposed to immunized disclosures will not be permitted to take the stand at trial unless he 'persuasively claim[s] that he can segregate the effects of his exposure.'" Pet. 21. *See also id.* at i (question presented #2). There was no such holding.

To begin with, the IC does have "canned" testimony from North, in the form of the immunized testimony that he gave before Congress. Under the holding below, the IC remains free to use that testimony. But the IC apparently has no use for such untainted testimony. Therein lies the problem. After North was exposed to Admiral Poindexter's immunized testimony he testified at his own trial and, in doing so, deviated from and expanded upon his earlier "canned" testimony in material ways; it is that later, post-exposure testimony that the IC insisted upon using against Poindexter, even though North repeatedly swore that it was the direct product of his thorough immersion in Poindexter's immunized testimony.

In rejecting the IC's position, the court of appeals imposed no "procedural requirement." It simply stated that "where a substantially exposed witness does not persuasively claim that he can segregate the effects of his exposure, the prosecution does not meet its burden merely by pointing to other statements of the same witness that were not themselves shown to be untainted." Pet. App.

A at 16a. In other words, the IC had not disproved taint merely by pointing to the testimony that North was able to give at his own trial *after* his exposure to the immunized testimony. It truly is "difficult to quarrel," Pet. 22, with that result.

The IC nonetheless reads this unexceptional holding as precluding the prosecution from carrying its burden by presenting "circumstantial indicia that the witness had not been affected by the immunized testimony." Pet. 22; *see also id.* at 24. It does nothing of the kind. The court in *North* explicitly disavowed the suggestion "that the prosecutor was barred from trying to show in any fashion that a witness' testimony was not influenced by the immunized testimony," *North II*, 920 F.2d at 943, and in this case the court expressly "decline[d] to adopt the [similar] suggestion of amicus American Civil Liberties Union." Pet. App. A at 16a. Instead, the court held only that the IC had failed here to adduce any probative "circumstantial indicia" and noted that, indeed, the "IC has not suggested any other way in which he might meet his burden if we were to remand." *Id.*

4. At bottom, the IC's argument is predicated upon the oft-repeated but wholly fictitious claim that the district court found "North lied when he denied having an untainted memory." Pet. 23; *see also, e.g., id.* at 6-7, 8, 22, 27 n.19. There was no such finding. The district court did find—and this was the narrow and only matter encompassed by the district court's "credibility determination," Pet. 23—that North lied when he denied having *any independent knowledge* of the destruction of the December 1985 presidential Finding. Pet. App. C at 133a; Pet. App. B at 83a. As the court of appeals correctly noted, however, the district court "*never* made a finding that North's *recollection* (either at the time of his own trial or later at Poindexter's trial) was not refreshed or otherwise 'shaped, altered, or affected' by his exposure to Poindexter's immunized testimony." Pet. App. A at 14a (emphasis added).

The district court actually found that North was *not* the witness hypothesized in question presented #3 as having "a present, independent recollection of events." Pet. i. Immediately following the pretrial *Kastigar* hearing, the court observed that North's sworn statement that his recollection of events had been pervasively influenced by "what he had heard and read about them in Poindexter's immunized testimony," Pet. App. D at 163a-164a, "stands . . . unrefuted." *Id.* at 165a. The court stated that it "could decline to credit that testimony only if it were to reject North's assertions as entirely unbelievable," *id.*, and it refused to do that. Instead, the court deliberately ruled that "it will accept the North assertion." *Id.* Although the court had doubts about North's veracity both then and later, *see* Pet. App. C at 133a; Pet. App. B at 83a, the court steadfastly adhered to that ruling. Thus, even after trial the court reconfirmed that it "accept[ed] as a general proposition North's assertion of an inability to distinguish between his own conversations [*sic*] and the version of events described in defendant's immunized testimony." Pet. App. B at 83a-84a n.40. The court simply permitted North to testify against Poindexter notwithstanding. *See* J.A. 1095-96 (Opinion of Jan. 4, 1990); *compare* J.A. 946-1021 (North's pretrial testimony) *with* J.A. 1200-1672 (North's trial testimony). That was the error that the court of appeals quite properly corrected.[2]

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[2] In view of its disposition of the case, the court of appeals had no occasion to consider whether the trial court's finding concerning North's purported independent knowledge of the destruction of the presidential Finding was clearly erroneous, which it most certainly was. In his own immunized testimony before Congress, North had stated that he could not specifically recall ever seeing the presidential Finding; when North then heard Admiral Poindexter's immunized testimony, he realized that he had been present when Poindexter tore up the Finding; liberally borrowing from Poindexter's immunized description of what he had done and why he had done it, North then wove that newly acquired knowledge into his testimony at his own trial, without ever expressly affirming that he had actually known at the time that Poindexter was tearing up the

5. The IC complains that the appellate court's conscientious enforcement of section 6002 and vigilant safeguarding of the constitutional privilege against self-incrimination "will make almost impossible the prosecution of any case involving public immunized statements that requires testimony by persons sympathetic to the

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Finding. *See* page 8, *supra*; *compare Poindexter Testimony* at 18-23 *with* Pet. 25 n.18.

The district court gave no credible reason for rejecting North's account. Indeed, the court initially accepted it. Pet. App. D at 165a-166a. Then, when informed that inability to prove that Poindexter had destroyed the Finding would "cut the heart out of the Government's case," J.A. 1176, the court reversed itself and found North to be lying about his lack of independent knowledge. Pet. App. C at 131a-135a. But the reasons given by the court in support of that finding were insubstantial.

The court reasoned first that North's "own trial testimony" constituted compelling evidence of independent knowledge. *Id.* at 133a. But North's trial testimony was given *after* exposure and thus was itself presumptively tainted; North had explained that the testimony in fact was tainted; and the court, which had not observed North at his own trial, was in no position to compare or comment upon the credibility of North's testimony on that occasion. As its second rationale, the court hypothesized, with absolutely no evidentiary basis for doing so, that as witness to the "ceremonial destruction of a state paper" North must have known and remembered what he had seen. *Id.* at 134a; *see also* Pet. App. B at 84a. The court was indulging in a fanciful and melodramatic reconstruction of what had appeared to eyewitnesses as the prosaic and off-hand disposal of a superseded draft. *See* pages 8-9 n.1, *supra*. It was only after the trial—and some six months after the pretrial *Kastigar* hearing—that the district court offered "North's demeanor at the *Kastigar* hearing" as a third reason for rejecting his account. Pet. App. B at 85a. A reviewing court necessarily must be deeply skeptical when a court, after first accepting testimony and then rejecting it on insubstantial nondemeanor grounds, attempts long after the fact, and as an obvious afterthought, to justify its decision by reference to the witness' demeanor—especially where, as here, the witness' account was facially plausible, internally consistent, and supported by that of the only other eyewitness. Moreover, the court never gave a reason, and there is none, for believing that North deliberately lied when he claimed, during the course of his own immunized testimony, that he could not specifically recall ever seeing the Finding.

accused." Pet. 22. Of course, the taking of compelled testimony is not intended to be cost-free to the government; the decision below, however, works no change in the fundamental calculus. Indeed, the IC had warned Congress, in terms just as apocalyptic as those now used in the petition, that a grant of immunity to Admiral Poindexter could create "insurmountable" barriers to successful prosecution. *North I*, 910 F.2d at 863. In the face of this warning, Congress deliberately granted immunity and caused widespread dissemination of the immunized testimony, knowing that in doing so it was "taking a great chance that the witness cannot constitutionally be indicted or prosecuted." *Id.* at 862.

In any event, the IC exaggerates both the problem a prosecutor faces and the practical significance of that problem. Prosecution is hardly "impossible." At the very minimum, a prosecutor can use testimony taken from witnesses in advance of their exposure—like the "canned" testimony taken from North and other witnesses here—and also may question exposed witnesses about subjects not covered in the immunized testimony. Furthermore, cases like this and *North* are truly *sui generis*. It will be a rare case indeed where immunized disclosures receive such widespread publicity and are so closely studied for the very purpose of developing testimony to be given before a grand jury or at trial. And this case must be literally unique in the government's selection as its key witness one so thoroughly and purposefully immersed in immunized testimony as North. Conscientious enforcement of section 6002 in cases like this poses no seriously recurrent problem for prosecutors.

6. It should be recalled, finally, that the court of appeals has directed the IC to show on remand that immunized testimony was not used before the grand jury, Pet. App. A at 17a-18a, and the IC has acquiesced in that ruling. *See* Pet. 8 n.4. As a practical matter, that means this case is over. Confronted with an identical ruling in *North*, the IC dismissed the indictment without even attempting to make the required showing. *See* Pet. App. A

at 46a. This was hardly surprising, for the facial indicia of taint were overwhelming. *See North I*, 910 F.2d at 863-64. Because the grand jury and, indeed, the original indictment were identical in both cases, the same result is sure to follow here. There is no need for this Court to render a merely advisory opinion on other issues in the meantime.

II. THE PROPER SCOPE OF SECTION 1505.

In an effort to make the decision below appear vastly more significant than it really is, the IC repetitively overstates the actual holding with respect to section 1505. Thus, the IC begins by claiming that the court of appeals held the statute "unconstitutional as applied to all cases that do not involve subornation." Pet. 10. That is manifestly incorrect. The decision holds only that the statute "cannot constitutionally be applied to some of the conduct, specifically lying to or misleading the Congress, with which Poindexter is charged." Pet. App. A at 2a. The court explicitly limited its consideration to "the sufficiency of the allegations regarding false and misleading statements" and deliberately left standing all other portions of the counts under section 1505. *Id.* at 18a-19a. This preserves, for example, the possibility of reprosecution on that portion of count 3 charging Poindexter with deleting electronic mail messages from the memory of his office computer—a charge obviously not involving subornation. *See* J.A. 215. Indeed, apart from the allegations of false or misleading statements, and notwithstanding the IC's flat assertion to the contrary, *see* Pet. 15, the decision below leaves intact the application of section 1505 to all the "[m]any common forms of obstructive behavior—such as concealing or destroying evidence, conduct [allegedly] undertaken by Poindexter in this case and charged in Count 3." *Id.* at 14.

In a series of related exaggerations, the IC claims that the decision below "leaves a large gap in the criminal law," Pet. 9, by "render[ing] nugatory a law that is of central importance," *id.* at 10, and "debilitating the

principal weapon against obstruction of Congress." *Id.* at 14. Section 1505 is hardly debilitated or rendered nugatory by a refusal to extend its coverage to arguably deceptive but literally truthful statements; no court ever has held (and, indeed, apparently no other prosecutor ever has argued) that the statute can be so broadly construed. Moreover, even if, as the IC claims, the decision below implies that allegations only of lying (rather than, as here, of lying or misleading in the alternative) also fall outside the scope of the statute—a result that would by no means be unprecedented, *see United States v. Essex*, 407 F.2d 214 (6th Cir. 1969)—such conduct still would remain subject to prosecution under 18 U.S.C. § 1001. *See* Pet. App. A at 20a, 39a-44a. The decision thus neither weakens the substantive prohibitions of the criminal law nor detracts from effective enforcement.

In the final analysis, the narrow result of the decision below is merely to confirm that administrative officials, lobbyists, and others do not commit felonies when they make misleading but literally true statements in an effort to influence Congress. That result surely is correct, and it does not warrant review by this Court.

1. The IC reads the opinion below as resting exclusively on constitutional grounds and complains that the court did not suggest "that Poindexter's conduct fell outside the plain [*sic*] terms of Section 1505." Pet. 10. That is wrong. The court noted that the statutory text "does not at all clearly encompass" the indictment's allegations, Pet. App. A at 20a, reasoned that "[o]n its face, § 1505 favors the transitive reading," *id.* at 23a, and ultimately held that the statute does "not cover the conduct at issue on this appeal." *Id.* at 39a. It was precisely because the statute on its face does not appear to cover all the indictment's allegations that the court undertook to review the legislative history and caselaw, before concluding that neither "supplies the constitutionally required notice that the statute on its face lacks." *Id.*

The decision reflects both a careful reading of the statute and its history and a proper weighing of the

demands of due process. Under counts 2 and 3 of the indictment, the IC sought, and the district court permitted, Admiral Poindexter's conviction for making literally truthful statements. Def. S.A. 9; J.A. 2186. Section 1505 does not extend that far and, as a constitutional matter, it could not.

2. Even the dissenting judge below agreed that section 1505 does not criminalize "politically misleading (but literally true) advocacy." Pet. App. A at 52a. The political advocate's artful use of literal truth in an effort to influence Congress was not intended to be, and is not, "corrupt" within the meaning of section 1505. Were it otherwise, every lobbyist in town would soon be behind bars. This common-sense reading of the statute is especially compelling in a case like this, involving communication between the two political branches. Congress cannot have intended to chill the flow of information out of the Executive Branch by making every truthful but arguably misleading statement potentially criminal.

Furthermore, if the question of statutory construction were close, which it is not, any doubt would have to "be resolved in favor of lenity." *Rewis v. United States*, 401 U.S. 808, 812 (1971). "[W]hen there are two rational readings of a criminal statute, one harsher than the other, [courts] are to choose the harsher only when Congress has spoken in clear and definite language." *McNally v. United States*, 483 U.S. 350, 359-60 (1987). Congress has not made it "clear and definite" that section 1505 applies to literally true but possibly misleading statements.

3. Nor did Congress make it "clear and definite" that section 1505 applies to false statements. That issue is not squarely presented here, for the IC sought conviction regardless of falsity. Def. S.A. 9; J.A. 2186. The court of appeals, aware of this fact, narrowly limited its holding to the IC's specific allegation of "lying to *or* misleading the Congress." Pet. App. A at 2a (emphasis added); *see also id.* at 34a. On the other hand, at other places in its opinion the court referred to the conduct at issue

simply as "lying to Congress." *E.g.*, *id.* at 19a. This choice of language appears to indicate the court's view that section 1505 cannot fairly be read to encompass even narrow allegations of lying, let alone the broader allegations of lying or misleading that the IC has made in this case.

Such a limitation on the scope of the statute would be both faithful to the statutory text, which, as the court noted, strongly suggests that the word "corruptly" is used in its transitive sense, *see id.* at 23a, and entirely consistent with the legislative history, which at no point reveals any intention of duplicating the prohibitions of section 1001. *See id.* at 24a-34a. The IC, referring to a predecessor statute, argues that "[a]s the first clause [of that statute] directly addressed endeavors to suborn or tamper with witnesses, it is hardly likely that the second clause was intended to serve . . . a similarly 'transitive' purpose," Pet. 19, but that is self-evidently incorrect: the second clause, now section 1505, principally serves the residual or "omnibus" function of prohibiting the suborning of all persons not themselves witnesses, such as congressmen, legislative staff, administrative officials, and other nonwitnesses. Such conduct is "the 'core' behavior to which the statute may constitutionally be applied." Pet. App. A at 37a. Its "application to other behavior is uncertain." *Smith v. Goguen*, 415 U.S. 566, 578 (1974).

The IC contends that the word "corruptly" is sufficiently elastic, and yet also adequately precise, to encompass the making of false statements; but the petition suggests no coherent definition of that word. Instead, the IC adopts the circular reasoning of *United States v. Mitchell*, 877 F.2d 294, 299 n.5 (4th Cir. 1989): in *Mitchell*, which did not itself involve false statements, the court reasoned that "corruptly" implies that "any attempt to improperly influence a congressional investigation is illegal." *See* Pet. 11. But it obviously will not do simply to replace one vague term ("corruptly") with another ("improperly"). *See United States v. Reeves*,

752 F.2d 995, 1001 (5th Cir. 1985). To be sure, the IC has identified cases in which section 1505 has been applied to the making of false statements. *See* Pet. 12-13 & n.10. But in none of those cases did the court expressly consider whether and then determine that the word "corruptly" is constitutionally concrete as applied to such conduct; the statute simply was applied by default. The analogous provision in section 1503 has received greater judicial attention, and at least one court has held that "[n]either the language of section 1503 nor its purpose [covers] the rendering of . . . false testimony." *Essex*, 407 F.2d at 218. *See also, e.g., United States v. Thomas*, 916 F.2d 647, 653 (11th Cir. 1990).

In any event, it would be premature in this case to address the application of section 1505 to unadorned allegations of outright lying to Congress. The indictment seeks Admiral Poindexter's conviction even for true statements, and it is solely the indictment in this case that is at issue here. No case cited by the IC upholds a conviction under section 1505 for making misleading but literally true statements or, indeed, comes even remotely close. For example, in *United States v. Alo*, 439 F.2d 751, 754 (2d Cir.), *cert. denied*, 404 U.S. 850 (1971), which the IC characterizes as involving "false and evasive" statements, Pet. 12, the court said "the jury had to conclude [the defendant] was lying."

4. Application of section 1505 to true statements unquestionably would, as even the dissenting judge below observed, "stretch the statutory terms beyond constitutional limits." Pet. App. A at 52a-53a. Nothing in the word "corruptly" or in the remaining text of the statute gives the slightest hint that a political advocate's use of literal truth to mislead could be criminal. "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). A statute that made it a crime to tell the

truth "corruptly" would impermissibly "allow[] policemen, prosecutors, and jurors to pursue their personal predilections." *Smith v. Goguen*, 415 U.S. at 575; *see also, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). Guilt or innocence in a criminal trial cannot be allowed to turn on the jury's idiosyncratic notions of political morality.

5. The IC expresses concern that the decision below may be followed in cases involving other obstruction statutes. Pet. 15 & n.13. But that would work no change in the law: the IC offers no evidence that any of those statutes ever has been applied to misleading but literally truthful statements. It is highly significant, however, that the most recent of these statutes, section 1512(b), unlike section 1505 and other forebears, proscribes tampering with testimony by "corruptly persuad[ing] another person, or attempt[ing] to do so, or *engag[ing] in misleading conduct* toward another person" (emphasis added). This reveals that when Congress wants to punish misleading statements or conduct, it knows how to do so and does so explicitly. Congress did not do so in any of the obstruction statutes other than section 1512. Moreover, even if other obstruction statutes were held, as was section 1503 in *Essex*, to have no application to outright falsehoods, the prosecution still would be armed with sections 1001 (false statements) and 1621 (perjury). There would be no troublesome gap in the law.

Finally, the IC's suggestion that numerous other statutes also may be affected by the decision below, *see* Pet. 15-16 n.14, is an obvious makeweight. Those statutes either explicitly punish perjury, proscribe various physical acts, or impose no criminal sanctions. They are untouched by the holding in this case that the word "corruptly," as used in section 1505, is not sufficient to imply a prohibition against statements that are alleged to be false or misleading.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 92-591

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA,

Petitioner,

-v.-

JOHN M. POINDEXTER,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF INDEPENDENT COUNSEL ARLIN M. ADAMS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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BRIEF OF INDEPENDENT COUNSEL ARLIN M. ADAMS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

Independent Counsel Arlin M. Adams submits this brief *amicus curiae* in support of the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia in this case.

INTEREST OF THE *AMICUS CURIAE*

This Office of Independent Counsel was established on March 1, 1990 pursuant to 28 U.S.C. § 593, the Ethics in Government Act, by the Special Division of the United States Court of Appeals for the District of Columbia.[1/] The original mandate and subsequent amendments charge this Office with investigating whether the former Secretary of the Department of Housing and Urban Development ("HUD") and others may have conspired to defraud the United States, or committed other federal crimes in connection with the administration of various HUD programs. The Office has been granted the investigative and prosecutorial authority described in 28 U.S.C. § 594.

We believe that the court below erred in ruling that the word "corruptly" in 18 U.S.C. § 1505 is unconstitutionally vague. That holding has adversely affected this Office's charging decisions in fulfilling its responsibilities under the Special Division's mandate. Moreover, the ruling invites, and has resulted in, the challenge to other, similarly worded statutes, which if successful could result in the impairment or defeat of pending prosecutions by this Office as well as the abandonment of possible future prosecutions. This Office of Independent Counsel accordingly has a substantial interest in the Court's review and reversal of the decision of the court of appeals.

1/ Under the terms of his appointment, the Independent Counsel is authorized to exercise all powers of the Attorney General and other officers of the Department of Justice, including the power to appear in any court proceeding he considers necessary. 28 U.S.C. § 594(a)(1). The Independent Counsel appears in the name of the United States. Id. § 594(a)(9). Accordingly, we believe that, under Rule 37.5 of the Rules of this Court, consent to the filing of this brief *amicus curiae* is not required. Should the Court determine otherwise, we will move for leave to file this brief, or file the necessary consents.

ARGUMENT

We agree with and join in the reasons given in the petition why the decision of the court of appeals is incorrect. Our purpose here is to substantiate the petitioner's forecast (at 14) that the decision below "will have very significant practical consequences" for the administration of justice. Indeed, it has already had such consequences, as we shall demonstrate.

Our investigation so far has led to pleas of guilty to the commission of various federal crimes by three defendants, and the indictment of eight other defendants. Three of those eight are currently being tried. Four others are scheduled to be tried in December 1992 and January 1993. For the remaining defendant no trial date has been set. We are continuing to investigate whether other individuals may have conspired against the United States or committed other federal crimes; these ongoing investigations may result in additional charges.

1. Violations of § 1505 Have Gone and Will Go Uncharged.

A significant portion of this Office's investigation has focused on the extensive testimony regarding various HUD programs heard by congressional committees, including the committee whose hearings led to this Office's establishment. See Hearings before the Employment And Housing Subcommittee of the Committee on Government Operations of the House of Representatives, 101st Cong., 1st and 2nd Sess. (1989-1990). We believe that the testimony of some witnesses at those hearings violated § 1505, in that those witnesses "corruptly * * * influence[d], obstruct[ed], or impede[d] or endeavor[ed] to influence, obstruct, or impede" Congress' inquiries. But because the decision below has removed this instrument for protecting (and punishing

efforts to undermine) the integrity of congressional investigations, we have necessarily forgone charging these witnesses under § 1505. Our decisions in this respect have been adversely affected both as to defendants who have already entered pleas of guilty and to defendants who are currently under indictment.

Moreover, this Office is continuing to investigate the testimony of certain witnesses before congressional committees. Based on our past experience and on what now seems to be the promise of those investigations, it appears that the decision below will shield still other individuals from being charged with violations of § 1505.

The conduct that we believe is outlawed by a reasonable construction of § 1505 is not necessarily covered either by 18 U.S.C. § 1001, for the reasons stated in the petition (at 14-15), or by the federal perjury statute, 18 U.S.C. § 1621, which does not reach testimony that is deliberately and deceptively incomplete or misleading yet falls short of being demonstrably untrue. Hence in the matters under this Office's jurisdiction, and in other cases in which the Justice Department is responsible for enforcement, individuals who are guilty of obstructing Congress may escape prosecution if the decision below is permitted to stand.

2. Litigation Over Similarly Worded Statutes Has Already Started.

The indictments in some of this Office's pending cases include, and possible indictments in future cases brought by this Office may include, counts charging one or more violations of 18 U.S.C. § 1503. That section makes it a crime "corruptly" to "influence[], obstruct[], or impede[], or endeavor[] to influence, obstruct, or impede, the due administration of justice." The defendant in one of those

pending cases, charged in two counts of violating § 1503, has challenged the constitutionality of that statute, relying on the decision below and arguing that, "[u]nder the reasoning of Poindexter, a person's own lying [to a grand jury] cannot constitute an obstruction of the due administration of justice."[2/]

We believe that § 1503 is surely constitutional. First, the court of appeals' construction in this case of § 1505 is erroneous. Second, the differences between the two statutes are sufficient to sustain the constitutionality of § 1503 in any event. But the important point for present purposes is that the mischief of the decision below has already spread to at least one of the seventeen other federal criminal statutes that use the word "corruptly" to define an element of the offense. See Petition at 15-16 & nn. 13, 14. More litigation, in other circuits over the constitutionality of § 1505, and everywhere over the other seventeen statutes, is a certainty. Timely guidance from this Court may head off that litigation completely, or, at the least, announce principles that will minimize the uncertainty to litigants and the judicial burdens that may otherwise be anticipated.

3. Review of the *Kastigar* Issue is Also Warranted.

The court of appeals' construction of the requirements of *Kastigar v. United States*, 406 U.S. 441 (1972), does not so directly affect this Office's responsibilities as does the invalidation of § 1505. But it is nonetheless clear that the *Kastigar* ruling will create grave

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2/ Defendant Cruse's Memorandum of Law in Support of Motion to Dismiss Counts Two and Four of the Indictment, filed October 16, 1992, at 5, in *United States v. Victor R. Cruse*, Cr. No. 92-0136 (NHJ) (D.D.C.). Trial in this case is scheduled to commence on January 11, 1993. The motion to dismiss is pending.

problems in the prosecution of defendants whose activities have prompted Congress' exercise of its investigative responsibilities. As the petition points out (at 21-23 and 26-29), the court of appeals has imposed an overly stringent standard under which prosecutors, without use of any circumstantial evidence, must affirmatively rule out any possibility that an immunized defendant's testimony has "in some way influenced" a witness. Pet. App. at 15a. This absolute standard would be considered harsh in any circumstance -- especially where the party carrying the burden is called upon to prove a negative -- and it is particularly unwarranted in criminal conspiracies, where mendacious witnesses can often be expected to tailor their testimony to benefit their co-conspirators.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 12, 1992

No. 92-591

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN M. POINDEXTER, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONER'S REPLY BRIEF

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In the Supreme Court of the United States

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PETITIONER'S REPLY BRIEF

In opposing review of this case, Poindexter does not take issue with any of the basic legal propositions advanced in the petition. Instead, he challenges our *description* of the holding below, arguing that the court of appeals did *not* hold 18 U.S.C. 1505 unconstitutional as applied to a wide range of obstructive conduct, did *not* bar the prosecution's use of most relevant circumstantial evidence in satisfying the requirements of *Kastigar*, and did *not* apply an extraordinarily expansive

substantive Fifth Amendment standard. These assertions, however, plainly cannot be squared with the language and analysis used by the court of appeals, as even the most cursory reading will confirm. That Poindexter has sought to obscure the scope of the decision below nevertheless is revealing; it amounts to a tacit acknowledgement of the expansive reach and mischievous force of its holding.

A. The Court of Appeals' Constitutional Vagueness Holding Warrants Review

In contending that the first question presented in the petition does not warrant review, Poindexter reads the opinion below to hold *as a matter of statutory construction* that Section 1505 does not reach lying to or misleading Congress, and he proceeds to defend the merits of that purported holding. Br. in Opp. 16, 25-30. If Poindexter were correct, that would hardly diminish the importance of the case or the appropriateness of review by this Court, for the construction of the statute hypothesized by Poindexter would place the D.C. Circuit in conflict with the many decisions that have applied Sections 1505 and 1503 in circumstances such as those here. See Pet. 12-14 & n.10. In fact, however, this attempt by Poindexter to divert attention from the remarkable constitutional analysis actually used by the court of appeals, while understandable as a tactical matter, is not sustainable.

The court of appeals simply did not rule that Section 1505 is *inapplicable* to Poindexter's conduct; instead, it held flatly and repeatedly held that "the term 'corruptly' is too vague to provide constitutionally adequate notice." Pet. App. 21a-22a. See, *e.g.*, *id.* at 2a ("the statute as written cannot constitutionally be applied"); *id.* at 21a (describing statute's "vagueness problem"); *id.* at 24a (looking for "narrowing interpretation" that would "put a reasonable person on notice that the statute applies"); *id.* at 39a ("the statute is unconstitutionally vague as applied to Poindexter's conduct"). As we demonstrate in the petition (at 11-12, 16-20), the

constitutional analysis used to reach that conclusion cannot be reconciled with the decisions of this and other courts. Equally as important, the holding below rests on an insupportably broad approach to the void-for-vagueness doctrine that will prove enormously destructive to a large body of legislation.

Although Poindexter does not take issue with our analysis of this Court's decisions, he does attempt to minimize the effect of the holding below by suggesting (Br. in Opp. 16-17, 25) that it precludes only those prosecutions under Section 1505 that are directed at persons who lied to or misled Congress (or administrative agencies, which also are protected by the statute).[1] In fact, the decision would be of considerable practical importance even if so limited, as is made clear by the innumerable past prosecutions for precisely such conduct under Section 1505 and under what Poindexter himself acknowledges (Br. in Opp. 29) to be the "analogous" proscription of 18 U.S.C. 1503 -- prosecutions that are cited at Pet. 12-14 & n.10 and that Poindexter makes no serious attempt to distinguish. But the holding below cannot, in any event, be so cabined. The court of appeals described "subornation" (and perhaps not even all forms of that) as "the

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[1] Actually, Poindexter argues that "it would be premature in this case to address the application of section 1505 to unadorned allegations of outright lying to Congress" because, he asserts, "[t]he indictment seeks Admiral Poindexter's conviction even for true statements." Br. in Opp. 29. This attempt to narrow the holding is untenable. The court of appeals flatly and repeatedly held that Section 1505 could not constitutionally be applied to "lying to the Congress." Pet. App. 19a. See *id.* at 22a ("lying to the Congress"), 24a ("lying"), 39a ("false and misleading statements"). As for the indictment, both Count 2 and Count 3 charged Poindexter with making statements that were misleading *and* false (see J.A. 208-215); at a minimum, the jury charge as to Count 3 explained that Poindexter was accused of making "false[]" statements. J.A. 2181.

'core' behavior to which the statute may constitutionally be applied." Pet. App. 37a. See *id.* at 38a-39a. That analysis, which Poindexter simply ignores, would preclude prosecution of most common forms of obstructive behavior.

Poindexter offers no reason to doubt the prediction that the broad language of the decision below -- which opines "that, on its face, the word 'corruptly' is vague" (Pet. App. 20a; see *id.* at 21a-22a) -- both will bar the prosecution of criminally obstructive behavior and will prompt challenges to the constitutionality of many other statutes. In fact, the court of appeals' holding already has had precisely those effects; supporting the petition, the Independent Counsel charged with investigating the administration of the Department of Housing and Urban Development has informed the Court that the decision below has forced him (and will force him in the future) to forgo charging certain defendants who have engaged in criminal conduct. I.C. Br. 3-4. He also notes (at I.C. Br. 4-5) that, as a consequence of the holding in this case, he is now embroiled in litigation concerning the constitutionality of Section 1503.

Finally, Poindexter's contention (at Br. in Opp. 25-26, 30) that the holding below does not leave a significant gap in the criminal law is premised on his unduly narrow reading of the court of appeals' decision -- and is, in any event, again belied by the experience of the HUD Independent Counsel. See I.C. Br. 4. And more fundamentally, it is not the place of a criminal defendant (or of a court of appeals) to choose the provisions under which a prosecution will proceed. Here, the court below held a useful and oft-invoked federal statute unconstitutional in many of its most important applications; almost by definition, that decision warrants this Court's attention.

B. The Court of Appeals' Procedural Holding Under *Kastigar* Warrants Review

The petition's second question seeks review of the holding below that the government may not carry its *Kastigar* burden by pointing either to persuasive evidence that a witness was lying when he denied having an untainted recollection of events or to other circumstantial indicia establishing that the trial testimony had not been affected by the witness's exposure to the defendant's immunized testimony. See Pet. 21-26. Poindexter does not take issue with our submission that such a holding would merit review by this Court. Instead, he asserts that we have mischaracterized the decision below, arguing that the petition "attacks a purported procedural ruling that the court manifestly did not make" (Br. in Opp. 16); in particular, he denies both that the district court found North to be lying when he denied having an untainted memory and that the court of appeals held that finding legally irrelevant (*id.* at 21-22). Although Poindexter's current interest in denying the dramatic scope of the holding below is easy to understand, he is wrong on both counts.

1. Poindexter takes issue with our statement that the district court found North to be lying when he denied having an untainted recollection of events; Poindexter asserts that "[t]here was no such finding" (Br. in Opp. 21), that the court in fact found North's recollection to be *tainted* and "steadfastly adhered to that ruling" (*id.* at 22), and that "[t]he court simply permitted North to testify against Poindexter notwithstanding" (*ibid.*). Those assertions are demonstrably incorrect. It is true, as we noted in the petition (at 6), that the district court initially ruled that North would be permitted

to give only limited testimony. See Pet. App. 164a.[2] But the court subsequently held that, at the *Kastigar* hearing, North was "prevaricating on * * * whether he had to rely for his recollection of events on Poindexter's immunized testimony" (*id.* at 133a); after trial, the court reaffirmed that it "found as a fact that North's * * * claim * * * was totally incredible" (*id.* at 83a (footnote omitted)) and concluded that North was "not telling the truth" (*id.* at 85a). It is difficult to imagine how the district court could have stated its finding in clearer terms.[3]

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[2] At no time, however, did the court intimate that it believed North, as Poindexter evidently means to suggest. See Br. in Opp. 22. To the contrary, even as it limited North's testimony the court declared that it was "skeptical" about North's statements (Pet App. 164a), had "doubts concerning [North's] credibility" (*ibid.*), found his account "dubious" (*id.* at 165a n.34), and would in fact have "reject[ed] North's assertions as entirely unbelievable" were "the issue one of lesser gravity." *Id.* at 165a.

[3] Poindexter claims that the district court even after trial continued to "'accept[] as a general proposition North's assertion of an inability to distinguish between his own conversations [*sic*] and the version of events described in defendant's immunized testimony.'" Br. in Opp. 22, quoting Pet. App. 83a-84a n.40. This quotation is, to put it charitably, incomplete. After making the observation quoted by Poindexter the district court immediately went on to state that its willingness to accept North's account had been based "on the theory that [the court] would not otherwise be able to find an independent basis of knowledge. 727 F. Supp. at 1500. *However, with respect to the particular issue under consideration here, North has provided the Court with such independent evidence by way of his own trial testimony [that is, testimony at North's own trial].*" Pet. App. 84a n.40 (emphasis added). And while Poindexter suggests that the district court never found North's memory to have been unaffected by exposure to Poindexter's immunized testimony, the court in fact found it

(continued...)

Poindexter is equally incorrect in denying that the court of appeals held the district judge's finding to be legally irrelevant. In fact, the court of appeals expressly noted the "trial court's finding that North, out of loyalty to Poindexter, lied when he asserted that he was unable to segregate his own recollection from the effects of his exposure." Pet. App. 15a. But the court of appeals nevertheless held that the finding could not be used to establish that North *was able* to segregate his own recollection, explaining: "More to the point, even if North's assertion [of taint] were to be given no weight, the [Independent Counsel] would still have failed to meet his burden, which is to demonstrate that the immunized testimony did *not* influence the witness." *Ibid.* (emphasis in original). We explained in the petition (at 23-24) that this holding is inconsistent with decisions of this and other courts. Poindexter fails even to attempt to distinguish those decisions.[4]

2. Poindexter asserts that "the court of appeals imposed no 'procedural requirement'" precluding the government's use of circumstantial evidence to establish lack of taint where

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[3] (...continued)
"inherently incredible that, as he claimed at the *Kastigar* hearing, North did not remember" the destruction of the Presidential Finding. *Id.* at 84a.

[4] Poindexter argues that the district court's factual finding was incorrect. Br. in Opp. 22-23 n.2. That argument is beside the point here; as we have explained, the court of appeals noted the finding and held it *legally irrelevant*. It is worth noting, however, that Poindexter's factual submission is wrong. Poindexter simply ignores the most probative evidence considered by the district court: had North's testimony at the *Kastigar* hearing been true, the conversations concerning the destruction of the Presidential Finding that he vividly described at his own trial *could not have taken place*. See Pet. 25 n.18. That the court of appeals deemed such evidence irrelevant demonstrates the patent illogic of its rule.

"canned" testimony is unavailable (Br. in Opp. 20); he points to the court's boilerplate statement that it did not "'mean to preclude the use of any techniques of which we [are] not aware' and by which the prosecution might be able to carry its burden." Pet. App. 15a-16a, quoting *North II*, 920 F.2d at 943. But we demonstrate in the petition (at 22-26) -- and Poindexter nowhere denies -- that the court of appeals held legally irrelevant both the government's proof that North's statements were "inherently incredible" (Pet. App. 84a) and its evidence that North's trial testimony differed in significant respects from Poindexter's immunized disclosures (which established the existence and extent of North's independent recollection of the events to which he testified). The court's holding thus essentially covered the waterfront in precluding the use of circumstantial evidence.

C. The Court of Appeals' Substantive Fifth Amendment Holding Warrants Review

In arguing that the court of appeals' substantive Fifth Amendment ruling does not warrant review, Poindexter asserts that the petition misstates the holding below when it reports that the decision "stands for the rule that '"the government must demonstrate affirmatively that the immunized testimony did not ... [have] an influence on [the trial witnesses'] thinking, even one for which they cannot at this time consciously account."'" Br. in Opp. 19, quoting Pet. App. 10a. Poindexter contends that this passage from the decision below simply repeats the district court's characterization of Poindexter's own position and that the court of appeals "did not mean to endorse or adopt that [characterization] as its own position." Br. in Opp. 19.

Again, Poindexter is incorrect. In fact, the court of appeals explained that Poindexter's understanding of *Kastigar*'s requirements was "not unlike the one we later applied in *North*" (Pet. App. 9a); it cited the district court's rejection of Poindexter's position as evidence that the trial

judge applied "a conception of 'use' much narrower than ours in *North*." *Id.* at 10a. Indeed, it is difficult to see why Poindexter resists our description of the decision below, which is no different in substance from his own repeated assertion that impermissible taint occurs if exposure to immunized testimony leads a witness to "remember[], understand], or appreciate[]" events differently. Br. in Opp. 9.

In any event, we explain in the petition (at 26-28) that the standard spelled out both in the decision below and in *North* cannot be reconciled with this Court's application of attenuation concepts under the Fourth and Fifth Amendments. Poindexter labels this Court's decisions "inapposite" but gives no explanation as to why that is so. Br. in Opp. 18. Instead, he makes the factual contention that attenuation notions are not applicable here because, he asserts, tainted evidence was placed before the jury. See *id.* at 18, 19-20. That contention is incorrect on its own terms.[5] But more important, it also

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[5] As evidence that immunized testimony was placed before the jury, Poindexter asserts that prosecutors studied North's testimony at his own trial and forced North to repeat that testimony at Poindexter's trial (Br.in Opp. 18); Poindexter fails to note the district court's finding that North's testimony at his own trial was untainted. Poindexter's assertion that "if ever there was a witness affected by immunized disclosures, North was that witness" (*id.* at 20), similarly ignores the district court's finding that North had an untainted memory of events. And Poindexter's statement that Rep. Hamilton, a government witness, "was permitted to testify that he had heard Poindexter admit [before Congress] destroying the Finding" (*id.* at 12; see *id.* at 20) is meritless. In fact, when Rep. Hamilton stated during direct examination that Poindexter had acknowledged destroying the finding (a statement that evidently referred to Poindexter's immunized testimony), the district judge immediately cut off questioning; he subsequently found that the statement had been "harmless beyond a reasonable doubt" (J.A. 1071) because "Hamilton's fleeting testimony imparted no

(continued...)

is beside the point. The court of appeals, which announced an absolutist approach that leaves no room for attenuation, applied the wrong standard; Poindexter's factual arguments are appropriately made on remand after this Court corrects the court of appeals' error.

Poindexter also contends that review is not warranted because prosecutions like this one "are truly *sui generis*." Br. in Opp. 24. We agree, of course, that cases involving nationally televised immunized testimony are rare (although the rules governing in such circumstances are important because those cases invariably are of the greatest public importance). But as we explain in the petition (at 28-29 & n.20), and as Poindexter cannot deny, there have been any number of prosecutions of persons whose immunized testimony was widely disseminated among the interested parties -- prosecutions in which issues identical to those here might arise. Pointing to the dismissal of the indictment in *North*, Poindexter also asserts that "this case is over" as a practical matter because it will be impossible for the government to show on remand that the indictment is untainted. Br. in Opp. 24-25. Again, Poindexter is wrong. The North indictment was dismissed because it would have been very difficult, under the court of appeals' standard, to demonstrate that the *trial* in that case was untainted by *North's* immunized testimony. Nothing in that dismissal suggests that the government could not prevail on a remand in showing that the *indictment* was untainted by *Poindexter's* testimony.

For the foregoing reasons and the reasons presented in the petition, the petition for a writ of certiorari should be granted.

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[5] (...continued)
substantial information not already before the jury." J.A. 2247 (footnote omitted). This ruling plainly was correct and was not disturbed by the court of appeals.

Respectfully submitted.

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